TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 297

MRS. IRIS CHRISTINE BERGHOLM ET AL.,
PETITIONERS,

vs.

PEORIA LIFE INSURANCE COMPANY OF PEORIA,
ILLINOIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 14, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

(36,111)

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[Caption omitted]

BE IT REMEMBERED, that at a regular term of the District Court of the United States for the Northern District of Texas, at Lubbock, Texas, on the 23rd day of June, 1930, which term is still pending, the Honorable James C. Wilson, United States District Judge for the Northern District of Texas presiding, the following cause came on for trial and was tried, to-wit:

MRS. IRIS CHRISTINE BERGHOLM

versus No. 12, At Law.

PEORIA LIFE INSURANCE COMPANY, OF PEORIA, ILLINOIS.

PLAINTIFFS' ORIGINAL PETITION.

Filed August 21, 1929, in the District Court of Lubbock County, Texas, and filed November 25, 1929, in the District Court of the United States.

2 In the 99th District Court of Lubbock County, Texas.

Mrs. Iris Christine Bergholm,

vs. No. 3847.

Peoria Life Insurance Company of Peoria, Illinois.

To the Honorable Clark M. Mullican, Judge of Said Court:

(1) Now comes Mrs. Iris Christine Bergholm, who resides in Lubbock County, Texas, herein called plaintiff, complaining of Peoria Life Insurance Company of Peoria, Illinois, a private corporation, organized and existing under and by virtue of the laws of

State of Illinois, with its general office and principal place of business at Peoria, Illinois, with a permit to do business in the State of Texas, having its Texas office at Dallas in charge of Thos. A. Stamp, State Manager, and local agent, upon whom service may be had, which Company is herein called defendant; and as a cause of action the plaintiff respectfully represents to the Court:

(2) That heretofore, to-wit, on or about March 13, 1926, the defendant issued and delivered to the plaintiff's husband, Carl Oscar Bergholm, a policy of life insurance in the principal sum of Five Thousand Dollars ($5,000.00) on the life of said Carl Oscar Bergholm, and in favor of his wife, Iris Christine Bergholm, plaintiff, in consideration of the payment in advance of One Hundred Ninety and 70/100 Dollars ($190.70) for the first policy year and the payment of a like sum on the 27th day of February each year thereafter, during the continuance of said policy, until the premiums for twenty policy years, including the first, have been paid, and that said policy contained an income disability clause to the effect that upon receipt by said Company of satisfactory proof that the insured is totally and permanently disabled, as hereinafter defined, the company wills (1) pay

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for the insured all premiums becoming due thereon after the receipt of such proof and during the continuance of the total and permanent disability of the insured, and will also, (2) pay to the insured a monthly income for life of one per cent of the face of the policy; the first payment of such income to be paid immediately upon receipt of such proof and the subsequent payments to be made on the 1st day of each month thereafter so long as the insured shall live and be totally and permanently disabled, as hereinafter defined, and (3) in addition to the amount of premiums and a life income as above set forth, the

Company, in acordance with the terms of the policy, will pay the full face of the policy, together with all additions thereto, upon receipt of due proof of the death of the insured, and the premium and life income paid by the Company in conformity with this provision will not be an indebtedness on the policy, and that the value in the table therein contained will increase and progress from year to year and the said policy will be credited with dividends from the surplus in like manner, as if the premiums were being duly and regularly paid by the insured. It being stipulated in said income disability clause that to entitle the insured to the above total and disability benefit, said policy at the time of making claim of said benefits, must be in full force and all premiums becoming due, prior to making claim, must be duly paid by the insured and the total and the permanent disability of the insured must be due to bodily injury or disease, occurring while said policy is in full force and before the insured shall have attained the age of sixty years, and must be such as to prevent the insured, then and at all times thereafter, from performing any work or conducting any business for compensation or profit, whereby the defendant became bound and is liable to pay the plaintiff, as the surviving wife of the insured, the monthly income of one per cent of the face of said policy, making said monthly income equivalent to Fifty Dollars ($50.00) per month, during the total and permanent disability of insured, together with the principal sum of Five Thousand Dollars ($5,000.00) upon the death of the insured.

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(3) That said policy also contained a clause to semi-annually or quarterly, in accordance with the the effect that the premiums may be paid annually, Company's rates indorsed on the back of said policy, and that in accordance therewith, by mutual agree-

ment between the insured and said Company, the insured was permitted to pay said annual premiums in four quarterly installments of Fifty and 55/100 Dollars ($50.55) each, on the 27th day of February, May, August and November, after the first annual premium had been paid in advance, thereby giving the insure the privilege of making such quarterly payments in lieu of annual payments.

(4) And that the insured paid the first annual premiums and the next two quarterly premiums maturing August 27, 1927, thereby keeping said policy in full force and effect to September 27, 1927, counting the thirty days grace allowed by said policy and the laws of Texas, under which it was written.

(5) That during the month of April, 1927, or thereabout, and while said policy was in full force and effect, and all premiums thereon had been promptly paid as they matured, the insured became totally and permanently disabled as a result of disease occurring while said policy was in full force and effect, and before the insured attained the age of sixty years, which disease was such as to prevent the insured then and there and at all times thereafter from performing any work or conducting any business for compensation or profit; that the insured, at the time he obtained the life insurance policy in question for the benefit of his wife, was engaged in the business of a life insurance agent, writing insurance for this Company, and thereafter successfully devoted practically all of his time to such business and employment, from which business he realized compensation and profit with which to support himself and family until about the month of April, 1927, when he was seized and stricken with a peculiar disease and sickness that prevented him from then and at all times thereafter performing said work and conducting said business or soliciting

and writing life insurance, and as a consequence was unable to procure or write further life insurance, and was forced to permanently abandon same, submit himself to the examination, care and treatment of several physicians, who were unable to tell until a short time before his death the nature or cause of his sickness, and that the insured continued to linger and became worse until he finally finally died as a result of such sickness, disease and incapacity, in Hale County, Texas, on April 18, 1929, whereby the insured was relieved of the payment of any other premiums thereafter falling due, and became entitled to income disability benefits of Fifty Dollars ($50.00) per month on the 1st day of each month beginning May 1, 1927, and ending April 1, 1929, making a total sum of Twelve Hundred Dollars ($1200.00) which the insured was entitled in the income disability benefits under the policy, plus the further principal sum of Five Thousand Dollars ($5,000.00).

(6) That owing to the aforesaid sickness, disease and incapacity with which the insured suffered, rendered him incapable of writing insurance or otherwise attending to business, and owing to the further fact that his wife was obliged to teach school and otherwise employ her time and attention in trying to make a living and help take care of her stricken husband, neither of them had opportunity to see about the collection of their income disability clause, other than giving notice and furnishing proof thereof to the Company from time to time and within such reasonable time as opportunity would permit, the plaintiff herein now alleging that while she is not able to say positively just what notices, proofs and claims were furnished the Company by her sick husband, yet she says and alleges that upon her information and belief that such notices, claims and proofs were furnished

as soon as the insured became stricken and incapacitated, and as soon as he was able to do so, if he was able, at any rate within a reasonble time, and particularly that when the plaintiff first learned and finally determined that the insured was permanently disabled, as well as totally so, she did write to the defendant at its home office in Peoria, Illinois, and also to its State Manager, Thomas A. Stamps at Dallas, Texas, and furnished each with notice and proof of total and permanent disability and made claim for disability benefits on or about the month of February, 1928, and the month of April or May, 1928, and furnished such notice and proof as she felt was required and would be satisfactory to the Company, and furthermore asked the Company for assistance and advice as to what to do, and on or about the month of April or May, 1929, following the death of her husband, and in every instance within a reasonable time and as soon as opportunity did permit, such repeated notices, proofs and claims were made of the Company, and for payment of the policy and the income disability benefits, and that all such notices and proofs, claims and demands were ignored and refused, and liability denied, by the Company, on the ground that the policy had lapsed and ceased to be in full force and effect, because of the failure to pay the quarterly installment which the Company claimed matured August 27, 1927, whereby the plaintiff says all such notices, proofs, claim and demands as were required were furnished in the time and manner required by said policy, if such were required, which is not admitted but denied, and further alleged that if the policy did make such requirement and were binding as a condition precedent to recover, that such requirement and conditions were fnlly and faithfully performed, and if not performed were waived by the Company by the circumstances herein alleged, and

the Company is estopped now to deny liability, all of which notices, proofs, claim and demands were made upon said Company more than thirty days prior to the filing of this suit, whereby the plaintiff is entitled to recover 12% statutory penalty on the foresaid Five Thousand Dollar ($5,000.00) principal sum and Twelve Hundred Dollars ($1200.00), which the plaintiff says she is obligated to pay to her attorneys, Bean and Klett, of Lubbock, Texas, for filing suit and prosecuting same for recovery of the aforesaid sums, which the plaintiff says she is entitled to recover, but which the defendant has arbitrarily refused to pay without legal or moral justification or excuse.

(7) That plaintiff is the owner and holder of said policy entitled to the recovery thereon; that she has made the aforesaid demand, as alleged and that the defendant has refused to same, thirty days prior to the filing of this suit, and that plaintiff as a consideration of breach of contract by the defendant is entitled to recover her damages including the principal sum of Five Thousand Dollars ($5,000) the disability benefits amounting to Twelve Hundred Dollars ($1200), 12% statutory penalty amounting to Seven Hundred Twenty Dollars ($720.00), a reasonable attorneys' fees of Two Thousand Dollars ($2,000.00) with interest on all of said sums with the exception of attorneys' fees at the rate of 6% per annum from May 1, 1929.

Wherefore plaintiff prays the Court that the defendant be cited to appear and answer this petition as required by law, that on final hearing she have judgment for her debt and damage as alleged in the preceding paragraph with interest as stated, together

with such other and further relief to which she may be entitled, either in law or in equity.

BEAN & KLETT,
Lubbock, Texas,
Attorneys for Plaintiff.

The State of Texas,
Lubbock County.

I, Flora Atchison, Clerk of the District Courts in and for Lubbock County, Texas, hereby certify that the above and foregoing is a true and correct copy of plaintiff's original petition in cause No. 3847, styled Mrs. Iris Christine Bergholm vs. Peoria Life Insurance Company of Peoria, Illinois, as the same appears from the original on file among the papers in said case.

In testimony whereof, witness my hand and the seal of said Courts at office in Lubbock, Texas, this August 21, 1929.

.....
Clerk, District Courts, Lubbock County, Texas.

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8 PETITION FOR REMOVAL.

Filed Oct. 28, 1929, in District Court of Lubbock County, Texas.

In the District Court of Lubbock County, Texas,
99th Judicial District.

Mrs. Iris Christine Bergholm
vs.
Peoria Life Insurance Company, of Peoria, Illinois.

The petition of Peoria Life Insurance Company of Peoria, Ill., the defendant in the above numbered and

entitled cause, shows to the Court that the above suit was begun against this defendant in the 99th District Court of Lubbock County, in the State of Texas, on or about August 31, 1929.

That at the time said suit was begun, and at the present time, the defendant was and still is a corporation chartered by, and existing under and by virtue of the Laws of the State of Illinois, and having its chief office and place of business in the City of Peoria, in the State of Illinois, and it is not a citizen or resident of the State of Texas, and the plaintiff was and still is a citizen and resident of the State of Texas.

That the matter in dispute in said suit, and for which said suit is brought, exceeds the sum of $3000.00, exclusive of interest and costs, and the defendant herewith files a bond, with good and sufficient sureties, for its entering in the District Court of the United States for the Lubbock Division of the Northern District of Texas, within thirty days from the date of filing of this petition a certified copy of the record in said suit, and paying all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, as provided by the Statutes of the United States.

Wherefore, defendant prays this Honorable Court that this petition and bond be accepted and approved, and that said suit be removed into the District Court of the United States for the Lubbock Division of the Northern District of this Court and that this Court proceed no further in the premises.

PEORIA LIFE INSURANCE COMPANY, OF PEORIA, ILL.,

By EMMETT MAY, President.

9 The State of Illinois,
County of Peoria.

Emmet C. May, being duly sworn, says that he is President of the Defendant, Peoria Life Insurance Company, of Peoria, Illinois; that he has read the foregoing petition subscribed by him; and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. The reason why this verification is made by the deponent is that the defendant is a corporation.

EMMET C. MAY.

Subscribed and sworn to before me this 11th day of October, A. D. 1929.

JOHN B. WILLIAMS,
Notary Public, Peoria
County, Illinois.

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10 BOND.

Filed Oct. 28, 1929, in District Court of Lubbock County, Texas. Filed Nov. 25, 1929, in U. S. District Court.

Mrs. Iris Christine Bergholm
vs. No. 3847.
Peoria Life Insurance Company of Peoria, Illinois.

Bond.

Know all men by these presents, that Peoria Life Insurance Company, of Peoria, Illinois, a corporation

duly organized and existing under and by virtue of the Laws of the State of Illinois, as principal, and the undersigned as surety, are held and firmly bound unto Mrs. Iris Christine Bergholm in the penal sum of Five Hundred and no/100 ($500.00) Dollars, the payment whereof well and truly to be made unto the said Mrs. Iris Christine Bergholm, her heirs and assigns, we bind ourselves, our successors, assigns, and representatives, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Peoria Life Insurance Company, of Peoria, Illinois, having petitioned the 99th District Court of Lubbock County, State of Texas, for the removal of a certain cause therein pending, wherein Mrs. Iris Christine Bergholm is plaintiff and Peoria Life Insurance Company, of Peoria Illinois, is defendant, to the District Court of the United States in and for the Lubbock Division of the Northern District of Texas.

Now, if the said Peoria Life Insurance Company, of Peoria, Illinois, your petitioner, shall enter in the said District Court of the United States, within thirty days from the date of filing said petition, a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

In witness whereof, Peoria Life Insurance Company, of Peoria, Illinois, has hereunto caused this Bond to be signed by its President, has hereunto caused this Bond to be signed by its President, and its seal to be affixed by its Assistant Secretary, this 11 day of October, A. D. 1929.

And the undersigned surety has hereunto
11 set its hand and seal the 11th day of October, A. D. 1929.

PEORIA LIFE INSURANCE COMPANY, OF PEORIA, ILLINOIS,
By EMMET C. MAY, President.
Principal.
AMERICAN SURETY CO.,
By J. A. McCELVEY,
Surety.

The State of Illinois,
County of Peoria.

On this 11 day of October, A. D. 1929, before me personally appeared Emmet C. May, to me known, who, being by me duly sworn, did depose and say that he is President of the Peoria Life Insurance Company, of Peoria, Illinois; that he resides in Peoria, Peoria County, and State of Illinois; that he knows the corporate seal of Peoria Life Insurance Company, of Peoria, Illinois; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was so affixed by order of its Board of Directors, and that by like order he signed the same as President. And on the same day and year before me personally appeared Paul F. Bournheidt, to me known, who being duly sworn, did depose and say that he is Assistant Secretary of the said Company; that he resides in Peoria, Peoria County, and State of Illinois; that he knows the corporate seal of Peoria Life Insurance Company, of Peoria, Illinois; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was so affixed by order of its Board of Directors, and that by like order he attested the same as Assistant Secretary.

JOHN B. WILLIAMS,
Notary Public, Peoria County, Illinois.

12 ORDER OF REMOVAL.

Filed Oct. 28, 1929, in District Court of Lubbock County Texas. Filed Nov. 25, 1929, in the U. S. District Court.

In the District Court of Lubbock County, Texas,
99th Judicial District.

Mrs. Iris Christine Bergholm
vs. No. 3847.
Peoria Life Insurance Co.

On this the 28 day of October, 1929, the Peoria Life Insurance Company, of Peoria, Illinois, defendant in the above numbered and entitled cause, presented herein its Petition for Removal of this case to the District Court of the United States for the Northern District of Texas, Lubbock Division, and also its Bond, conditioned according to law.

It is, therefore, ordered that said Petition and Bond be filed, and said Bond accepted and approved, and this Court will proceed no further herein, and said cause is transferred to the District Court of the United States for the Northern District of Texas, Lubbock Division, by virtue of said Petition and Bond.

CLARK M. MULLICAN,
District Judge, Lubbock
County Texas.

13 PLAINTIFF'S AMENDED ORIGINAL PETITION.

Filed June 17, 1930.

In the United States District Court for the Northern District of Texas, at Lubbock.

Mrs. Iris Christine Bergholm,
vs. No. 12 At Law.
Peoria Life Insurance Company of Peoria, Illinois.

To the Honorable James C. Wilson, Judge of said Court:

(1) Now comes the plaintiff in the above styled and numbered cause, and with leave of the Court, states that heretofore this suit was filed by her against Peoria Life Insurance Company of Peoria, Illinois, in the 99th District Court of Lubbock County, Texas, as shown by Cause No. 3847 on the docket of said Court, and afterwards removed to this Court by petition for removal on the ground of diversity of citizenship; and such cause having been removed to and now pending in this Court the plaintiff, with leave, files the plaintiff's amended original petition, and for such amendment says:

(2) Now comes Mrs. Iris Christine Bergholm, a resident citizen of Lubbock County, Texas, herein called plaintiff, complaining of Peoria Life Insurance Company of Peoria, Illinois, a private corporation, organized and existing under and by virtue of the laws of the State of Illinois, with its general office and principal place of business at Peoria, Illinois, of which state it is a resident citizen, with a permit to do business in the State of Texas, having its Texas office at Dallas in charge of Thos. A. Stamp, State Manager,

and local agent, upon whom service may be
14 had, which company is herein called defendant; and as a cause of action the plaintiff respectfully represents to the Court:

(3) That heretofore, to-wit, on or about March 13, 1926, the defendant issued and delivered to the plaintiff's husband, Carl Oscar Bergholm, in Texas, where the insured resided, a policy of life insurance in the principal sum of Five Thousand Dollars ($5,000.00) on the life of said Carl Oscar Bergholm, and in favor of his wife and beneficiary, Iris Christine Bergholm, plaintiff, in consideration of the payment in advance of One Hundred Ninety and 70/100 ($190.70) for the first policy year and the payment of a like sum on the 27th day of February each year thereafter, during the continuance of said policy, until the premiums for twenty policy years, including the first, have been paid, and that said policy contained an income disability clause to the effect that upon receipt by said Company of satisfactory proof that the insured is totally and permanently disabled, as thereinafter defined, the company will: (1) pay for the insured all premiums becoming due thereon after the receipt of such proof and during the continuance of the total and permanent disability of the insured, and will also, (2) pay to the insured a monthly income for life of one per cent of the face of the policy, the first payment of such income to be paid immediately upon receipt of such proof and the subsequent payments to be made on the 1st day of each month thereafter, so long as the insured shall live and be totally and permanently disabled, as thereinafter defined, and (3) in addition to the amount of premiums and a life income as above set forth, the Company, in accordance with the terms of the policy, will pay the full face of the policy, together with all additions thereto, upon

receipt of due proof of the death of the in-
15 sured, and the premiums and life income paid by the company in conformity with this provision will not be an indebtedness on the policy. It being stipulated in said income disability clause that to entitle the insured to the above total and permanent disability benefit, said policy at the time of making claim to said benefits, must be in full force and all premiums becoming due prior to making claim must have been duly paid by the insured and the total and the permanent disability of the insured must be due to bodily injury or disease, occurring while said policy is in full force and before the insured shall have attained the age of sixty years, and must be such as to prevent the insured then and at all times thereafter from performing any work or conducting any business for compensation or profit, whereby the defendant became bound and is liable to pay the plaintiff, as the surviving wife of the insured, the monthly income of one per cent of the face of said policy, making said monthly income equivalent to Fifty Dollars ($50.00) per month, during the total and permanent disability of insured, together with the principal sum of Five Thousand Dollars ($5,000.00) upon the death of the insured.

(4) That said policy contained a clause providing that "the net proceeds of this policy as a death claim shall be held in trust by the company together with interest thereon at the rate of 3½% per annum, and annual dividends from surplus interest earnings as apportioned by the company, to be payable to Iris Christine Bergholm, beneficiary hereunder, as follows: An installment of $50.00 upon receipt of due proof of the death of insured, followed by an installment of $50.00 each month thereafter as long as such funds held in trust shall be sufficient to continue such installments."

(5) That plaintiff says that if mistaken in paragraph three of this petition to the effect the whole of such proceeds remaining unpaid at the death of the insured are payable to plaintiff upon insured's death, then plaintiff says all of such proceeds with the exception of the unpaid monthly income disability benefits of $50.00 each payable to the insured during his life time, became a trust fund in the hands of defendant bearing interest at the rate of 3½% per annum payable to the plaintiff in monthly installments of $50.00 each upon due proof of death of the insured or denial of liability by defendant; and if such monthly income disability benefits of $50.00 each payable to insured during his lifetime are not payable to the plaintiff in a lump sum, then that such unpaid monthly income disability benefits payable to the insured during his life have become part of said trust payable to the plaintiff as alleged; and that in consequence thereof the defendant has become bound and is obligated to make such payments as alleged. The plaintiff here prays the Court to find, under the pleadings and proof, just how such proceeds and benefits are payable, and enter appropriate judgment to the effect that the defendant be bound liable for all such proceeds and benefits, and order the defendant to pay such as are due and payable without prejudice to plaintiff's right to sue and obtain judgment for unmatured proceeds as and when they mature under the contract.

(6) That said policy also contained a clause to the effect that the premiums may be paid annually, semi-annually or quarterly, in accordance with the company's rates indorsed on the back of said policy, and that in accordance therewith, by mutual agreement between the insured and said company, the insured was permitted to pay said annual premiums in four quarterly installments of Fifty and 55/100 Dol-

lars ($50.55) each, on the 27th day of February, May, August, and November, after the first annual premium had been paid in advance, thereby giving the insured the privilege of making such quarterly payments in lieu of annual payments.

17 (7) That the policy in question was not issued and delivered to the insured until about March 20, 1926, or later, and that upon delivery the insured paid $190.70 to cover insurance for one year, which would keep said policy in force until March 20, 1927, and that the insured also paid in advance the next two quarterly annual premiums which kept said policy in force to September 20, 1927, and that under the law, as well as said policy, the insured was entitled to further period of 30 days' grace which kept said policy in full force and effect to October 20, 1927; that the defendant held out to the insured, as well as applicants and policy holders, that the premiums stated would pay for the insurance mentioned for such period of disability; that such was the premium uniformly paid for such insurance for such period; that there was no insurance under the policy prior to delivery; that insured received no protection, and there was no consideration for policy prior to delivery, as policy provided it should not take effect until delivered; that there could be no discrimination in rates or term, and that the defendant was obliged under the laws of Texas governing the contract of insurance to allow the insured one year's insurance for the one year paid from date of delivery of policy whereby the insurance in question remained in full force and effect to October 20, 1927, by payment of premiums.

(8) That plaintiff says that the policy sued on does not make the furnishing of proof of disability a condition precedent to payment of premiums or in-

come disability benefits by the defendant; that the time for furnishing such proofs is not of the essence of the contract, and that liability on the part of the defendant to pay such premiums and disability benefits is conditioned on the disability itself and not on proof thereof; that if there is any doubt or ambiguity in the policy with respect thereof same must be resolved against the defendant; that the defendant has so construed the policy as not containing any such condition;

18 that when the defendant delivered the policy in question to insured in Texas and collected premium there it knew that the highest Courts of Texas had given such construction to similar disability benefit clauses; and knew the Federal Courts would follow such construction by which the defendant is bound; that in addition thereto the defendant itself had resolved all doubt in favor of the insured in that the defendant in various descriptive literature had advertised that the disability benefits in question were payable on the happening of the disability, and no suggestion there would have to be proof of disability; that the insured and the plaintiff concurred in such construction; that the defendant is bound by such construction, and estopped by its own acts and representations to deny the truth thereof; whereby plaintiff says the insured was not required to furnish proof of disability as a condition precedent, and at most was only required to do so within a reasonable time, in order to stop payment of premiums and collect income disability benefits for total and permanent disability.

(9) That during the spring or summer of the year 1927, and prior to September 27, 1927, while said policy was in full force and effect, and all premiums thereon had been promptly paid as they matured, the insured became totally and permanently disabled as a result of disease occurring while said policy was

in full force and effect, and before the insured attained the age of sixty years, which disease was such as to prevent the insured then and there and at all times thereafter from performing any work or conducting any business for compensation or profit; that the insured, at the time he obtained the life insurance policy in question for the benefit of his wife, was engaged in the business of a life insurance agent, writing insurance for this company, and thereafter successfully devoted practically all of his time to such business and employment, from which business he realized compensation and profit with which to support himself and family, until the spring or summer of 1927, when he was seized and stricken with a peculiar disease and sickness that prevented him then and at all times thereafter from performing said work or any other work and conducting said business or any other business, and as a consequence was unable to procure or write further life insurance, do any work or engage in any business and was forced permanently to abandon same, submit himself to the examination, care and treatment of several physicians, who were unable to tell until a short time before his death the nature or cause of his sickness and that the insured continued to linger and became worse until he finally died as a result of such sickness, disease and incapacity, in Hale County, Texas, on April 18, 1929, whereby the insured was relieved of the payment of any premiums falling due on or after August 27, 1927, and became entitled to income disability benefits of Fifty Dollars ($50.00) per month on the 1st day of each month beginning September 1, 1927, and ending April 1, 1929, making a total sum of One Thousand Dollars ($1,000.00) which the insured was entitled in the income disability benefits under the policy, plus the further principal sum of Five Thousand Dollars ($5,000.00).

19

(10) That owing to the aforesaid sickness, disease and incapacity with which the insured suffered, rendering him incapable of writing insurance or otherwise attending to business or doing work, and owing to the further fact that his wife was obliged to teach school and otherwise employ her time and attention in trying to make a living and help take care of her stricken husband, neither of them was able or had opportunity to see about the collection of their income disability clause, other than giving notice and furnishing proof thereof to the company from time to time and within such reasonable time as opportunity would permit, the plaintiff herein now alleging that while she is not able to say positively just what notices, proofs and claims were furnished the company by her sick husband, yet she says and alleges upon information and belief that such notices, claims and proofs were furnished as soon as the insured became stricken and incapacitated, and as soon as he was able to do so, if he was able, both before and after September 27, 1927, at any rate within a reasonable time, and particularly that when the plaintiff first learned and finally determined that the insured was totally and permanently disabled, she did write to the
20 defendant at its home office in Peoria, Illinois, and also to its State Manager, Thomas A. Stamp, at Dallas, Texas, and furnished each with notice and proof of total and permanent disability, and made claim for disability benefits on or about the month of February, 1928, and the month of April or May, 1928, and also in May and July, 1929, and furnished such notice and proof as she felt was required and would be satisfactory to the Company, and furthermore asked the Company for assistance and advice as to what to do, and on or about the month of April or May, 1929, following the death of her husband, and in every instance within a reasonable time and as soon as opportunity did permit, such

repeated notices, proofs and claims were made of the Company, and for payment of the policy and the income disability benefits, and that all such notices and proofs, claims and demands were ignored and refused and liability denied by the Company, on the ground that the policy had lapsed and ceased to be in full force and effect, because of the failure to pay the quarterly installment which the Company claimed matured August 27, 1927, whereby the plaintiff says all such notices, proofs, claims and demands were furnished in the time and manner required by said policy, if such were required, which is not admitted but denied, and further alleges that if the policy did make such requirement and were binding as a condition precedent to recovery, that such requirement and conditions were fully and faithfully performed, and if not performed were waived by the Company by the circumstances herein alleged, and the Company is estopped now to deny liability, all of which notices, proofs, claims and demands were made upon said Company more than thirty days prior to the filing of this suit, whereby the plaintiff is entitled to recover 12% statutory penalty on the aforesaid Five Thousand Dollars ($5,000.00) principal sum and One Thousand Dollars ($1000.00) disability benefits, in addition to a reasonable attorneys' fees of Two Thousand Dollars ($2,000.00), which the plaintiff says she is obligated to pay to her attorneys, Bean and Klett, of Lubbock, Texas, for filing suit
21 and prosecuting same for estalishing liability and recovery of the aforesaid sums, which the plaintiff says she is entitled to recover, but which the defendant has arbitrarily refused to pay without legal or moral justification or excuse.

(11) That while the insured was totally and permanently incapacitated under the policy, and suffering with an irrecoverable disability as described, of which

fact defendant had knowledge by reason of repeated notice given to the defendant, the defendant denied all liability and declared that the policy had been lapsed and forfeited for nonpayment of premium due August 27, 1927; that on September 29, 1927, defendant, acting by and through its cashier, Earl R. Otta, of the defendant's State office in Dallas, wrote the insured his grace period had expired, meaning thereby that the policy had expired, and refused to recognize the policy or allow it to be reinstated "without a health certificate", which the insured could not furnish, and which defendant knew could not be furnished because insured had lost his heatlth; that again on October 17, 1927, the defendant, acting by and through its statistician, J. B. Williams of Peoria, Illinois, notified insured by mail that his policy had lapsed a week or two prior thereto; that again on November 10, 1927, defendant, acting by and through its manager of service department, L. J. Menerly, of Peoria, Illinois, wrote insured that his policy could be reinstated by furnishing loan agreement and health certificate, which defendant knew insured could not furnish because of his total and permanent disability; that the same office again wrote the insured substantially to same effect on November 26, 1927; that again on April 9, 1928, defendant, acting by and through Thos. A. Stamp, State Manager at Dallas, wrote the plaintiff in reply to her request of April 5, 1928, for disability claim for her stricken husband that the claim could not be allowed, contending the policy was not then in force; that again on May 13, 1929, defendant, acting through the same state manager, wrote the plaintiff the policy had lapsed for nonpayment of August, 1927, premium and
22 that the disability clause was not effective; that again on July 9, 1929, defendant, acting through its President, Ernest C. May, at Peoria, Illinois, denied liability on the ground that only

the first two quarterly payments had been made in 1927, and that after time the policy lapsed without any action. That this plaintiff now says in reply to the defendant's aforesaid continual declaration that the policy had lapsed for non-payment of quarterly premium due August 27, 1927, and denial of liability, that such statements were wrongful, false, and misleading to plaintiff and the insured; and that by such conduct on the part of the defendant the plaintiff and insured were excused from making further proof of disability, if such was ever necessary, which plaintiff again denies, and defendant forever estopped to defend liability on ground such proof was not furnished.

(12) That plaintiff says the insured furnished proof of such disability while the policy was in force and effect and before the last premium became due; that the insured furnished such proof within a reasonable time thereafter and that while the policy was in full force and effect the defendant declared the policy lapsed and denied liability; that before a reasonable time had expired after the last premium became due the insured furnished such proof, and again the defendant denied liability and declared the policy lapsed; that if the proof was not satisfactory, or within time, or within a reasonable time, the defendant made no objection thereto, other then to declare the policy had lapsed for failure to pay premium August 27, 1927, and that the Company waived further proof, and is so estopped to complain that proof was not furnished or that it was not sufficient.

(13) That plaintiff is the owner and holder of said policy and entitled to the recovery thereon; that she has made the aforesaid demand as alleged and that the defendant has refused to pay same, thirty

days prior to the filing of this suit, and again failed and refused to pay after plaintiff's attorneys, Bean and Klett, made written demand on defendant for payment of said policy more than thirty days
23 prior hereto; and that plaintiff as a consequence of breach of contract by the defendant is entitled to recover her damages including the principal sum of Five Thousand Dollars ($5,000.00), the disability benefits amounting to One Thousand Dollars ($1,000.00), 12% statutory penalty amounting to Seven Hundred Twenty Dollars ($720.00), a reasonable attorney's fee of Two Thousand Dollars ($2,000.00) with interest on all of said sums with the exception of attorneys' fees at the rate of 6% per annum for May 1, 1929.

(14) Wherefore, plaintiff prays the Court that the defendant, which has already answered, be cited to appear and answer this petition as required by law, and that on final hearing she have judgment against defendant for damages, for breach of contract for Five Thousand Dollars ($5,000.00) with interest thereon from May 13, 1929, at the rate of 6% per annum and judgment for further sum of One Thousand Dollars ($1,000.00) for income disability benefits from September 1, 1927, to April 1, 1929, at the rate of Fifty Dollars ($50.00) per month, with interest thereon at the rate of 6% per annum from date of maturity of each installment, a statutory penalty of 12% thereon amounting to Seven Hundred Twenty Dollars ($720.00), and a statutory attorneys' fee, which plaintiff says is reasonably worth Two Thousand Dollars ($2,000.00), but if it should be found from the pleadings and the proof that principal of said policy and disability benefits are not payable in a lump sum, and are only payable in monthly installments as alleged, then plaintiff prays in the alternative, that she have judgment fixing liability on the policy against

the defendant for the trust fund with interest thereon at the rate of 3½% per annum from May 13, 1929, without any recovery or execution thereon, except that plaintiff recover judgment and have execution for such installments and benefits as have matured to date of judgment with interest thereon from date of maturity of such installments and benefits at the rate of 6% per anum, also for Seven Hundred
24 Twenty Dollars ($720.00) penalty and Two Thousand Dollars ($2,000.00) attorneys' fees, and for such other relief to which plaintiff may be entitled either in law or equity, all of which, however, shall be without prejudice to right of plaintiff to sue for and recover judgment against defendant in event it fails or refuses to pay any installments or benefits maturing after rendition of judgment herein.

BEAN & KLETT,
Attorneys for Plaintiff.

25 Policy attached to Plaintiffs' Amended Petition, the following parts only of which are material:

"Total Abstainers Twenty Payment Life.....Year endowment option profit-sharing, five-year accumulation of profits, thereafter annual dividends.

Number - 140964 - Age - 37 -

The Peoria Life Insurance Company, promises to pay Five Thousand Dollars upon receipt of due proof of the death of Carl Oscar Bergholm, the insured, to Iris Christine Bergholm, Wife of the Insured and Beneficiary in accordance with the clause hereto attached, subject to the provisions of this policy.

This insurance is granted in consideration of the application herefor, which is hereby made a part of this contract, and of the payment in advance of One Hundred Ninety and 70/100 Dollars, being the premium for term insurance for the first policy year ending on the 27th day of February, 1927. After the first policy year the insurance will be continued as limited payment insurance upon the payment of the annual premium of One Hunderd Ninety and 70/100 Dollars, on or before the 27th day of February in every year during the continuance of this policy, until premiums for twenty policy years, including the first, have been paid.

Guaranteed Endowment Maturity (Exclusive of Dividends.)

If at the end of twenty years from the date hereof, this policy is in full force and no benefit shall have been paid or allowed under this policy on account of the total and permanent disability of the Insured, the Insured shall then have the Guaranteed Option to continue this Policy as a twenty-eight year Endowment Insurance Policy for its face amount, and the Company hereby guarantees that if premiums are paid for 28 years in all and the Insured be living on the 27th day of February 1954, the Company will then, upon the surrender of this policy, pay the Insured the face amount of this policy in cash. This guaranteed period of maturity may be further shortened by Dividends, as follows:

26

Single Cash Dividend.

At the end of the Fifth policy year, this policy, if in full force, will be credited with a Single Cash Dividend from the five year surplus accumulations,

as then apportioned by the Company to policies of the same age and kind. This dividend may be withdrawn in cash, or upon the Insured's written request to the Home Office within one month from the date when credited, may, without medical examination, be converted into a Paid-up Insurance Addition to this policy, at net single premium rated by the standard herein named.

Annual Cash Dividends.

At the end of the sixth and at the end of each and every policy year thereafter, this policy while in full force, will be credited with an Annual Dividend from the surplus, as apportioned by the Company to policies of the same age and kind. Each such annual dividend may be withdrawn in cash, or upon the Insured's written request to the Home Office within one month from the date when credited, may be converted into a Paid-up Insurance Addition to this policy, at net single premium rates by the standard herein named.

Dividends may be left on Deposit.

The single cash dividend and all annual dividends, if not drawn in cash or converted as aforesaid will, subject at all times to the written demand of the Insured, remain on deposit with the Company to accumulate at such rate of interest, in no event less than three per cent per annum, as the Company shall from time to time determine and allow. Should this policy mature as a death claim all dividend deposits remaining with the Company will be payable in cash to the beneficiary.

27 Premium Paying Period may be shortened.

The Insured may exchange this policy for a profit-sharing paid-up life policy for the face amount hereof whenever the accumulated dividend deposits, together with the reserve on this policy and on any paid-up insurance additions thereto, shall equal or exceed the net single premium for such a paid-up life policy by the standard herein named.

Total Abstinence Class.

In consideration of a statement signed by the Insured this policy is placed in the Total Abstinence class of the Company, the mortality record of which will be kept separate and distinct from that of the general class. In the apportionment of dividends, this policy will participate in accordance with its terms, and in addition thereto will further participate in the profits of the Total Abstinence class, as may be declared and allowed by the Board of Directors out of any mortality savings which the Company may experience by reason of a comparatively less death rate in said class. The Insured agrees that the use by the Insured of intoxicating liquors as a beverage, or the manufacture or sale by the Insured of same in any form for beverage will forfeit all rights and privileges to any extra dividends in said class, and that the payment of such extra dividends shall be at all times subject to satisfactory proof of the continued total abstinence of the Insured. Any forfeiture of said extra dividends, however, shall not in any way forfeit or affect the Insured's right to the regular dividends on this policy, payable according it its terms.

Total Abstainer's Endowment Option.

The Insured is hereby granted the option to mature this policy as an Endowment for its
28 face value, whether the accumulated dividend deposits together with the reserve on this

policy and on any paid-up insurance additions thereto, shall equal or exceed said face amount, and the Company will then, upon the surrender of this policy, pay the Insured the face amount of this policy in cash, together with any excess of said dividend deposits and reserve.

This policy is issued and accepted by all parties in interest with the express understanding that the contents of all of its pages form a part of this contract as fully as if recited over the signatures hereto affixed.

In witness whereof, The Peoria Life Insurance Company has, by its President, or Vice-President, and Secretary, executed this policy at Peoria, Illinois, this 13th day of March, 1926.

(G. B. PATTISON,)
Secretary.
EMMET C. MAY,
President.

Examined by G. A. Pratt.

Annual, Semi-Annual or Quarterly Premiums:

Premiums may be paid annually, semi-annually or quarterly, in accordance with the Company's rates indorsed on the back hereof, and the Company will allow a change from one to another of such modes of payment upon the Insured's written request therefor on the Company's form; should the Insured not survive to complete premium payments for the then current year, the amount necessary for such completion shall be considered an indebtedness hereon to the Company. All premiums are payable in advance, either at the Home Office of the Company in Peoria, Illinois, or to an agent of the Company, upon de-

livery of a receipt signed by the President or Secretary and countersigned by the authorized agent. If any premium is not paid on the date when due, this policy shall cease and determine, except as hereinafter provided.

29 Grace.

If any premium after the first is not paid on the date when due, this policy will continue in full force from said due date for the term of one month, of not less than thirty days, which is the month of grace allowed hereunder, wthout interest charge, in the payment of any such premium. In case of death of the Insured during the month of grace, the unpaid premium or premiums for the then current policy year shall be considered an indebtedness hereon to the Company.

Entire Contract.

This policy and the application herefor (a copy of which application is hereto attached) taken together constitute the entre contract. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid the policy unless it is contained in the written application herefor.

General Provisions.

This policy is payable at the Home Office of the Company in Peoria, Illinois, and proof of interest of claimant will be required; any indebtedness hereon to the Company will be deducted in any settlement of this policy or of any benefit hereunder. Only the President, Vice-President, or Secretary has power in

behalf of the Company to make or modify this or any contract of insurance or to extend the time for paying any premium and the Company shall not be bound by any promise or representation heretofore or hereafter made unless made in writing by one of said officers.

THE PEORIA LIFE INSURANCE COMPANY, PEORIA, ILLINOIS.

Attached to and forming part of the Company's Policy No. 140964. Peoria, Ill., March 13, 1926.

In accordance with the Insured's request it is hereby provided that the net proceeds of this policy as a death claim shall be held in trust by the Company, together with interest thereon at the rate of 3½% per annum and annual dividends from surplus interest earnings as apportioned by the Company, to be payable to Iris Christine Bergholm, Beneficiary hereunder, as follows: an instalment of $50.00 upon receipt of due proof of the death of the Insured followed by an instalment of $50.00 each month thereafter as long as such funds held in trust shall be sufficient to continue such instalments.

If the Beneficiary shall survive the Insured but shall not survive to receive the entire proceeds of this policy as provided by this agreement the balance of such proceeds shall be paid to his (or her) executors or administrators.

.....
Secretary.

Income Disability Clause.

A part of Policy No. 140964, Peoria, Ill., March 13, 1926—

Upon receipt by the Company of satisfactory proof that the Insured is totally and permanently disabled as hereinafter defined the Company will

1. Pay for the Insured all premiums becoming due hereon after the receipt of such proof and during the continuance of the total and permanent disability of the Insured and will also

2. Pay to the Insured a Monthly Income for life of 1% of this Policy; The first payment of such income to be paid immediately upon receipt of such proof and subsequent payments to be made on the first day of each month thereafter as long as the Insured shall live and be totally and permanently disabled as hereinafter defined and

3. In addition to the payment of premiums and a Life Income as above set forth the Company, in accordance with the terms of the policy, will pay the full face of this policy, together with all additions thereto, upon receipt of due proof of the death of the Insured, and the premiums and Life Income paid by the Company in conformity with this provision will not be an indebtedness on this policy, and the values in the tables herein will increase and progress from year to year, and this policy will be credited with dividends from the surplus, in like manner as if the premiums were being duly and regularly paid by the Insured.

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To entitle the Insured to the above Total and Permanent Disability Benefits this policy at the time of making claim for such benefits must be in full force and all premiums becoming due prior to the time of making claim must have been duly paid by the Insured, and the Total and Permanent Disability of the Insured must be due to bodily injuries or disease occurring

while this Policy is in full force, and before the Insured shall have attained the age of sixty years, and must be such as to prevent the Insured then and at all times thereafter from performing any work or conducting any business for compensation or profit; provided that, notwithstanding proof of disability may have been accepted by the Company as satisfactory, the Insured shall at any time, on demand, furnish the Company satisfactory proof of the continuance of such disability, and if such proof is not furnished, or if it shall appear to the Company that the Insured is able to perform any work, or to conduct any business for compensation or profit, then the Company shall cease to pay or allow the above benefits and the Insured shall immediately resume the payment of premiums hereon. The above provisions for benefits in event of the total and permanent disability of the Insured, shall become null and void if the
32 Insured shall engage in military or naval service in time of war; provided that, upon presentation after the termination of such service of evidence satisfactory to the Company that the Insured is acceptable for said additional benefits, said provisions will again become operative. The Company will extend the privileges and benefits for total and permanent disability hereunder to cover the irrecoverable loss of the entire sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot.

After the Insured shall have attained the age of sixty years the premium payable under this policy will be reduced by $11.35 which is the additional premium included therein for this Total and Permanent Disability Benefit.

.....

Secretary.

Examined by.....

MAR 5 1926

2273

Part 1 of Application for Insurance in

THE PEORIA LIFE INSURANCE COMPANY, OF PEORIA, ILLINOIS

1. Full name: Carl Oscar Bergholm — 140961

2. Address:

	Street Number or R. F. D.	City, Town or Village	County	State	How Long There
Present		Blanchard	Hale	Texas	4 mos
Previous					
Other		Mena	Limestone	Nebr	1 year

3. Residence, if more than one, give all: Insurance Agent

4. Business or occupation: Soliciting Life Insurance

5. How long employed: 11 yrs
Employer: Home Life Ins Co
Do you expect to change your occupation? Explain fully: No
Name of former employer: Ben King Gen Mgr

6. Has application been made for insurance on this life?

Company	Amount	Plan	Year Issued
Prud	1000	Ordinary	1918
Pru	500	Ordinary	1922

7. Has any such application by any Life Insurance Company been declined or accepted at other than regular rates? If so, give full particulars:
No

8. Has any application for insurance been pending?
No

9. Amount of insurance applied for $5000.00 ✓
with an annual premium of $190.20
Preliminary term rate: months @
After first year premium payable: annually

10. Plan of insurance: T. P. O.

☒ Disability benefits. ☐ Double indemnity.
Plan 2 is option if benefits are desired

11. Dividends are to be
☐ 1. Used to reduce the premium. ☐ 2. Applied to purchase Paid-up Additions.
☐ 3. Paid in cash. ☐ 4. Left to accumulate at interest.
Plan 2 is usual option given clients.

12. Make policy payable in event of my death to
Carl Christian Bergholm
Wife
(Relationship)

Dated on the 19 day of April
and you for reference herein will be understood to be signed
With the right reserved to change the beneficiary.
Subsequents are made payable to the insured at annually rates otherwise requested. If premium of policy on its date is not paid in advance or held in force by full insurance covering such premium should accompany application.

13. Special requests, etc.
Regular 20 pay life

14. For Home Office endorsements only

Upon receipt of the premium for payment of $ [illegible] with and the execution of a note for $190.20 as [illegible] 192[illegible]
I hereby declare the foregoing answers and statements to be true without evasion or concealment.
I agree that the Company according to its rules should issue a policy different from that applied for above, or in case of approval upon any [illegible] by the Company in this application, the Company is hereby authorized to amend this application by inserting the change in the space [illegible] Home Office endorsements only" and that any acceptance of any policy issued on this application shall constitute a ratification of such change or amendment.

Witness: Dated at Blanchard this 27 day of February 192[illegible]

C O Bergholm, Agent

Carl Oscar Bergholm
(Applicant's Signature)

USE BLACK INK

Part 2—ANSWERS MADE TO THE MEDICAL EXAMINER

PERSONAL HISTORY		21. Do you expect to travel or reside abroad?	
7. Name and nationality		22. Give usual occupations as to Height and Weight	
8. Single, married, widowed or divorced?		23. Have late height and weight been measured?	
9. Have you ever resided in the rural areas with a domestic animal? (If so, give date and relationship.)		24. Has your weight recently changed? If so, how much, how and when?	
10. Have you ever made any change in residence or occupation of your family?		25. What has been your greatest weight?	
11. Have you ever applied for a pension or for compensation for injury or disability or are you drawing a pension? (If so, state particulars.)		26. Do you now, or have you ever used opium, cocaine, or any other narcotic?	
HABITS		27. Have you ever taken treatment for liquor or drug habit?	
12. a. Do you use any tobacco, when, how or other than cigarettes?	a.	28. Have you ever been in any way connected with the manufacture or sale of intoxicating liquors?	
b. Have you ever used them?	b.		
c. Have you ever used them to excess or habitually?	c.		
d. If habit changed, how long have you been off?	d.		

29. ILLNESS—Has any physician or surgeon attended or prescribed for you during the last ten years? (If so, name them all and explain fully.)

Illness	Date	Duration	Complete Recovery	Physician's Name and Address
Influenza	1919	2 weeks	Complete	Tillie Schaffer Manning
Pleurisy	1920	4 weeks	Complete	Dr Percy Shangraw

30. Are you in sound health?		34. Have you ever been under observation, care or treatment in any institution, sanitarium, asylum or similar institution?	
31. Have you ever had any malformation or injury or other than any medical operation?		35. a. Have you ever had Rheumatism? b. How many attacks? c. Date and duration. d. What joints were affected?	a. b. c. d.
32. Have you any deformity or disability, and if so, loss of [illegible]		36. Have you ever been told that you had a. Albumin or Sugar in urine? b. Any Heart Trouble? c. Any Lung Trouble?	a. b. c.
33. Have you ever been examined for insurance without being accepted?			

a. Influenza		a. Head, Ear, Eye, Throat		a. Vomiting of Blood		a. Dizziness or Fainting	
b. Appendicitis		b. Asthma		b. Tuberculosis of any kind		b. Fits or Convulsions	
c. Tuberculosis of any kind		c. Bronchitis		c. High Blood Pressure		c. Mental Breakdown	
d. Diabetes		d. Pneumonia		d. Disease of the Heart		d. Cancer	
e. Kidney or Bladder Trouble		e. Pleurisy		e. Cancer or Tumor		e. Rupture or Hernia	
f. Rheumatism		f. Asthma or Hay Fever		f. Rheumatism		f. Stomach or Intestinal Trouble	

g. Have you ever had any sickness or disease not mentioned above? If so, state particulars under this head.

[redacted]

FOR EXAMINER ONLY

35 DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER.

Filed June 20, 1930.

(Title Omitted.)

The defendant requests leave to file its First Amended Answer in response to the plaintiff's Amended Original Petition filed herein.

WILSON, RANDAL & KILPATRICK,
Attorneys for Defendant.

The defendant, with leave of the Court, files this its First Amended Original Answer in response to the plaintiff's First Amended Original Petition:

1. The defendant excepts generally to said petition because the same states no cause of action against it, and is not sufficient to require it to answer; and of this it prays the judgment of the Court.

2. The defendant specially excepts to said petition because a policy of life insurance is referred to in said petition, and the meaning and construction of said policy is alleged, but the policy itself is nowhere set out and is not attached to said petition, and the petition should contain a copy of said policy; and of this it prays the judgment of the Court.

3. The defendant specially excepts to the said petition, and in particular to that portion of said petition contained in paragraph numbered 5, wherein the plaintiff prays that the Court find just how said policy is payable, because the plaintiff has alleged in

paragraph numbered 4 that said policy was payable in monthly installments of $50.00 each, and
36 because if said policy was attached or copied in said petition it would show on its face how any benefits were payable, and such allegation is vague, unintelligible, conflicting, and contradictory, and the plaintiff should be required to allege with certainty what recovery she is seeking from the defendant, and what her cause of action is; and of this it prays the judgment of the Court.

4. The defendant specially excepts to the said petition, and in particular to that portion of same contained in paragraph numbered 7 wherein it is alleged that the payment of the first premium of $190.70 would keep said policy in force until March 20, 1927, and that the next two quarterly annual premiums paid by the deceased kept said policy in force to September 20, 1927, and for thirty days thereafter, and is alleged that the defendant held out to the insured as well as applicants and policy holders that the premiums stated would pay for the insurance for such period of disability, and that the defendant was obliged, under Texas law, to allow insured one year's insurance for the one year paid, because said petition shows on its face in paragraph numbered 3 that the premiums were due and payable on the 27th day of February of each year, and that if the policy were pleaded it would show on its face that the premiums were payable at said time, and such allegations are an attempt to change the terms of the written contract, are contrary to its terms, and no fraud, mistake, or any other fact which would permit any variation in the terms of the contract are pleaded, and such allegations are mere conclusions of law or fact, or both, and no basis for such conclusion is pleased; and of this the defendant prays the judgment of the Court.

5. The defendant specially excepts to said petition and in particular to that portion of paragraph numbered 8 wherein it is alleged that the policy sued on does not make the furnishing of proof of disability a condition precedent to payment of disability benefits, and that the furnishing of such proof is not of the essence of the contract, and that liability is not conditioned on the proof of disability, and that when the defendant delivered the said policy it knew that the highest Courts of Texas had given such construction to similar clauses, and knew that the
37 Federal Courts would follow such construction; and it is further alleged that the defendant itself had resolved all doubt in favor of the insured in various descriptive literature wherein it had advertised that the benefits were payable on the happening of the disability, and that no suggestion in such advertisements was made that there would have to be proof of disability, and that the insured and the plaintiff concurred in such construction, and that the defendant is estopped to deny the truth thereof, and that the insured was not required to furnish proof of disability, and at most was only required to do so within a reasonable time; the defendant's exception to such allegation being (1) That such allegations are directly contradictory with the allegations contained in paragraph numbered 3 wherein a portion of the provisions of the policy are alleged requiring premiums to be paid on February 27th of each year, and requiring satisfactory proof while the policy is in full force and effect and at a time when all premiums had been duly paid; (2) Because if said policy was set out in plaintiff's petition the allegations contained herein would be directly contradictory to the provisions of such policy; (3) Such allegations are an attempt to alter, vary, or add to the provisions of the policy itself and the terms thereof, which are alleged in paragraph numbered 3 of plaintiff's petition, and said policy was

in writing, and no fraud, accident, or mistake, or any other fact is pleaded which would entitle such written contract to be so altered; and (4) Such allegations as to what the policy does or does not provide are more conclusions of law and fact, are vague and uncertain, and are prejudicial to the defendant; of all of which the defendant prays the judgment of the Court.

6. The defendant specially excepts to that portion of plaintiff's petition contained in paragraph numbered 9 wherein it is alleged that during the spring or summer of the year 1927, and prior to September 27, 1927, while said policy was in full force and effect and all premiums thereon had been promptly paid as they matured, in the insured became totally and permanently disabled from performing any work or conducting any business, or the business which he had followed until the spring or summer of 1927 when he became sick and that thereupon the deceased or insured was relieved of the payment of any premium falling due on or after August 27, 1927, and became entitled to disability benefits of $50.00 per month beginning September 1, 1927, because it should be alleged with certainty as to when the deceased became disabled; and it should also be alleged with certainty as to when premiums alleged to have been promptly paid were paid; and further because the allegation that the policy was in full force and effect is a mere conclusion and the facts showing such conclusion to be true are not pleaded as they should be, and because it is nowhere alleged in said petition nor in said paragraph that the insured, or any one for him, furnished the defendant with satisfactory proof of such disability at a time when all premiums becoming due prior thereto had been paid, or at a time when said policy was in full force and effect, and without pleading such facts the plaintiff

does not show herself to be entitled to recover any sum; and of all of this the defendant prays the judgment of the Court.

7. This defendant specially excepts to that portion of plaintiff's petition contained in paragraph numbered 10 wherein it is alleged that neither the insured nor his wife, who is the plaintiff, had opportunity to see to the collection of their income disability clause owing to the insured's sickness and his wife's work, other than giving notice and furnishing proof to the Company from time to time, and within such reasonable time as opportunity would permit, and that upon information and belief of the plaintiff, notices, claims, and proofs were furnished as soon as insured became stricken, because the policy's provisions, as alleged in plaintiff's petition and the terms of the policy which would be shown if pleaded, provide for the furnishing of satisfactory proof at a time when all premiums have been paid, and when the policy is in full force and effect, and that claim must be made at such time, and such allegations do not show that the contract was complied with, but on the other hand attempt to vary the terms of such written instrument without pleading any fraud, mistake, or other grounds for such variance; and of this it prays the judgment of the Court.

8. The defendant specially excepts to that portion of said petition contained in paragraph numbered 10 wherein it is alleged that the plaintiff wrote to the Home Office of the defendant and to its State Manager at Dallas, Texas, and furnished each with notice and proof of total and permanent disability, and made claim for disability benefits on or about the month of February, 1928, and the months of April or May, 1928, and in May and July, 1929, and furnished such notice and proof as she felt

was required and would be satisfactory, and asked the Company for assistance and advice, and that the defendant ignored all such notices, etc., and that she complied with the provisions of the policy, and that the Company is estopped to deny liability, because the furnishing of proof and the making of a claim at the times alleged would not be a compliance with the terms of the policy pleaded by the plaintiff requiring that such proofs and claims be made at a time when the policy was in full force and effect, and when all premiums coming due prior thereto had been paid, and would not bind this defendant, and such allegations are attempts to vary or alter the written contract without pleading any fraud or other fact which would entitle such variance, and are highly prejudicial to the defendant, inflamatory in their effect as allegations of fact, and are not facts which would estop the defendant from denying liability, of all of which the defendant prays the judgment of the Court.

9. The defendant specially excepts to that portion of plaintiff's petition contained in paragraph numbered 10, and also in paragraph numbered 13, wherein it is alleged that the notices, proofs, claims, and demands alleged to have been made in said paragraphs were made more than thirty days prior to the filing of this suit, whereby the plaintiff is entitled to recover twelve (12%) percent statutory penalty on the aforesaid $5000.00 principal, and $1000.00 disability benefits, in addition to a reasonable attorney's fees of $2000.00, because the plaintiff's petition shows on its face that the plaintiff is not entitled to recover the sum of $5000.00 in this suit, the terms of the policy alleged by plaintiff show the same, and the policy itself, if pleaded, would show the same; and because further it is not shown just how much was demanded by the plaintiff, nor what her claim was for, and in order to entitle the plaintiff to a recovery of the

statutory penalty and of attorney's fees it is necessary for the plaintiff to allege when such demand and claim was made, how much was demanded, and that the demand was for such sums as the plaintiff is entitled to, and it is not shown when and how such demands was made, for what the demand was made, or that the demand for the sum to which the plaintiff was entitled was made; of all of which the defendant prays the judgment of the Court.

10. The defendant specially excepts to that portion of plaintiff's petition contained in paragraph numbered 11 wherein it is alleged that the defendant notified the insured that his premium had not been paid within the time required by the policy, and further corresponded with him regarding same, and that such notices and correspondence, which are shown to have taken place long after the said premium was due, were wrongful, false, and misleading to the plaintiff and the insured, and excused them from making any further proof of disability, and that the defendant by such notices and correspondence is estopped to deny liability on the ground that proof was not furnished, because such allegations are not allegations of fact which would estop the defendant from relying on the policy, and are inflamatory and prejudicial to the defendant, and state no cause of action against it in that such allegations show in their face that any correspondence alleged was had after the time fixed by the policy for payment of the premium had passed, and such allegations are another attempt to vary the written policy without the allegation of any fraud or mistake, and the notices and correspondence alleged as a matter of law could not have misled the plaintiff or the insured to their injury, because they were at the times alleged either entitled to the benefits claimed or not entitled to them, and any subse-

quent proof or failure to make proof could not have affected their rights; of all of which the defendant prays the judgment of the Court.

11. The defendant excepts to that portion of plaintiff's petition contained in paragraph numbered 12 wherein it is alleged that the insured furnished proof of such disability while the policy was in force and effect, and before the last premium became due, and within a reasonable time, and that at such times the defendant declared the policy lapsed and denied liability, and that the defendant made no objection thereto other than to declare the policy had lapsed, and that the defendant is estopped to deny that proof was furnished or that it was sufficient, because said allegations lacks definiteness and certainty in failing to allege what proof was furnished and when; because such allegations are another attempt to vary the written policy without pleading fraud or other grounds therefor, and show no facts which would estop the defendant from denying liability, and do not
41 show that denial of liability was made before time for making claim had elapsed; of all of which defendant prays the judgment of the Court.

12. Without waiving any of the foregoing exceptions, and subject thereto, the defendant denies all and singular the allegations contained in plaintiff's petition; demands strict proof thereof; and prays for judgment in its behalf.

13. Subject to said exceptions, the defendant avers that on February 27, 1926, Carl Oscar Bergholm applied to it for a life insurance policy for an amount of $5000.00, with an annual premium of $190.70; that as soon as the application, with the report of the medical examiner, reached the Home Office of the de-

fendant the application was approved and the policy issued; that the said policy provided for the payment in advance of $190.70, being the premium for term insurance for the first policy year ending on the 27th day of February, 1927; that the said policy further provided that after the first policy year the insurance would be continued as limited payment life insurance upon the payment of the annual premium of $190.70 on or before the 27th day of February in every year during the continuance of the said policy; that the said policy further provided that the premiums might be paid annually, semi-annually, or quarterly, in accordance with the Company's rates indorsed on the back thereof, upon the request of the insured; that at the request of the insured the premiums after the first policy year ending February 27, 1927, were payable quarterly beginning February 27, 1927, making the quarterly payments come due in February, May, August, and November of each year, and on the 27th day of each of said months; that the said policy further provided that if any premium after the first was not paid on the date when due the policy would continue in full force from said due date for the term of one month of not less than thirty days, which was the month of grace in the payment of any such premium; that the said policy further provided that if any premium was not paid on the date when due, except as provided by the provision for the month of grace, the policy should cease and determine.

14. That the said policy provided that the death benefit should be paid in monthly installments of $50.00, and contained an income disability clause as alleged in the plaintiff's petition.

15. The defendant further alleges that the said policy provided, among other things, as follows: "Only

the President, Vice-President, or Secretary
42 has power in behalf of the Company to make or modify this or any contract of insurance, or to extend the time for paying any premium, and the Company shall not be bound by any promise or representation heretofore or hereafter made, unless made in writing by one of said officers."

16. The defendant further alleges that the insured, C. O. Bergholm, paid the premium of $190.70 on the first policy year of the said policy, and that at his request the premiums thereafter to become due were made payable quarterly as hereinbefore alleged; that the insured paid within due time the quarterly premium due on February 27, 1927, and also the quarterly premium due on May 27, 1927, that thereafter the insured paid no further premiums and did not pay the quarterly premium that was due on August 27, 1927, either on its due date or within thirty days thereafter, and wholly failed thereafter to pay any further premiums; that by reason of his failure to pay the quarterly premium which was due on August 27, 1927, at its due date or any other time, the policy, on thirty days after August 27, 1927, or within one month thereafter, ceased and determined, and was no longer in force and effect.

17. The defendant further alleges that neither the insured nor his wife, the plaintiff, who was the beneficiary in said policy, nor any other person for him, ever at any time until the 5th day of April, 1928, made any claim to the defendant or any of its authorized agents, officers, or employees that he was entitled to or demanding any of the benefits provided for in said policy for disabilities; that neither the insured nor the plaintiff, nor any other person, ever informed the defendant or any of its authorized agents, officers, or employees, until the 5th day of April, 1928, that

he was totally and permanently disabled or that due to bodily injuries or disease occurring while the policy was in full force and before any premiums were past due, that he was prevented by reason of such disabilities at said times and at all times thereafter from performing any work or conducting any business for compensation or profit; that neither was the defendant or any of its duly authorized officers, agents, or employees informed at any time until the 5th day of April, 1928, that he was totally and permanently disabled or that due to bodily injuries or disease occurring while the policy was in full force and before any premiums were past due, that he was prevented by reason of such disabilities at said times and at all times thereafter from performing any work or conducting any business for compensation or profit; that neither was the defendant or any of its duly
43 authorized officers, agents, or employees informed at any time until the 5th day of April, 1928, that he was unable to carry on his business, or to do any work; that the policy and the provisions hereinbefore referred to constituted a contract between the defendant on one side and the insured and probably the beneficiary on the other side, and such contract was full and clear in its provisions, and fully set out how the insured or the beneficiary should be entitled to any of the benefits provided therein; that the insured and the beneficiary wholly failed to comply with the terms of the said contract and to pay the premiums, and to give the defendant any information that the insured was totally and permanently disabled, and to make any claim for any of the benefits, and by reason of such failure the plaintiff is not entitled to recover anything from the defendant by this suit.

18. The defendant further alleges that the insured was an experienced insurance man; that he was agent

for the defendant, and was engaged during his lifetime in the business of selling its insurance policy; that in such capacities he was fully informed as to life insurance business generally and the business of the defendant in particular with its methods of doing business and handling of claims; that he had worked with the defendant's General Agents and had attended the conventions of the defendant's salesmen and agents; that he had used its advertising in the furtherance of his business and that of the defendant; that he applied for the policy sued on on his own initiative and selected for himself the kind of policy which he wished, and was thoroughly familiar with and informed as to all of its provisions and the effects thereof; that he knew that the policy fixed the dates on which the premiums should be paid, and that it provided that on default in the payments of such premiums the policy ceased and determined, and was no longer in full force and effect; that he accepted the said policy when it was delivered to him; that he paid the first year's premium; that he acknowledged that the first quarterly premium for the second policy year was due on February 27, 1927, and paid it in due time, and that the second quarterly premium for said policy year was due on May 27, 1927, and that he paid it in due time; that he acknowledged that the third quarterly premium for such year was due on August 27, 1927, and advised the defendant that he

44 was not able to pay such premium on its due date or at any time thereafter; that he and the plaintiff admitted to the defendant that default had been made in the payment of the quarterly premium which was due on August 27, 1927; that at no time during the year 1927, either before the quarterly premium due on August 27, 1927, was due or afterwards, did the insured or the plaintiff inform the defendant that he was totally and permanently disabled nor request the defendant to pay such premium

for him by reason of such disability, or make any demand or claim that he was entitled to any disability benefits nor to the payments of his premiums; that during said time the plaintiff herself informed the defendant that the insured could really do better than he had been doing in selling insurance; that during said times the insured himself attended to his business and to that of the defendant, and sold some insurance and collected some premiums and notes, and corresponded with the defendant regarding their business; that by reason of these facts the insured was and the plaintiff now is estopped from denying that the policy had lapsed for failure to pay the premium due August 27, 1927, or from asserting that the defendant had any knowledge of any alleged disability of the insured, and from now making any claim for any benefits under said policy, and by reason of such facts the plaintiff is not entitled to recover anything from the defendant by this suit.

19. The defendant further alleges that it is not true that the insured was disabled, as such term is meant by such policy, from April, 1927, and for the balance of said year, but on the other hand the insured did carry on his business and look after his affairs, and transacted business for the defendant, and pursued his occupation, and did labor and other work for compensation and profit during said times, and informed the defendant that he was doing such work, and by reason of such facts the plaintiff is not entitled to recover.

20. The defendant further alleges that by reason of the failure of the plaintiff to pay premiums, as hereinbefore alleged, and his failure to furnish the defendant any proof of total and permanent disabilities, as hereinbefore alleged, and by reason of the information given to the defendant by the insured during such

times that he was attending to his business, and by reason of the further fact that the plaintiff, who at times assisted the insured in his business, gave the defend- information from time to time,
45 as hereinbefore alleged, and that both the insured and the plaintiff failed to make any claim for benefits or advise the defendant of any alleged total and permanent disabilities until the 5th day of April, 1928, the plaintiff is now estopped to assert any liabilities on the part of the defendant, and is not entitled to recover from the defendant.

21. The defendant further alleges that at the time of the death of the insured his policy, sued upon, had long since ceased and determined, and for a long time had not been in force and effect, all of which has been hereinbefore set out, and the plaintiff is not entitled to recover on said policy.

22. The defendant further alleges that the policy sued upon does not provide for the payment of the sum of $5000.00 upon the death of the insured, but does provide for the payment of $50.00 per month, as alleged by the plaintiff and as hereinbefore set out, and if the plaintiff is entitled to recover from the defendant in this suit the sum of $5000.00, though the defendant expressly denies that she is entitled to any sum.

23. The defendant further alleges that the defendant has made no demand on the defendant for the payment of such sum as she would be entitled to under the terms of the said policy, if the policy had been in full force and effect at the time of the death of the insured, which is denied, and by reason of such failure to make such demand the plaintiff is not entitled to the statutory penalty nor to the attorney's fees alleged to be due to her and prayed for herein.

24. The defendant further alleges that, as hereinbefore alleged, the policy of insurance sued on is a complete contract and contains all of the terms and provisions agreed upon between the defendant and the insured; that there is no ambiguity in the provisions of the said policy; that there are no conflicts in its terms; that they were clearly understood; that the defendant has not been guilty of any fraudulent conduct in the sale of this policy nor its issuance, nor in any other respect toward the insured nor the plaintiff, and the terms of the contract should be enforced, and the plaintiff should not be permitted to add to or vary in any way the written terms of the policy.

46 25. That by reason of the default in the payment of the premium, as hereinbefore alleged, and the failure to make any proof of total and permanent disability, or make any claim for any benefits on the part of the insured or the plaintiff, the plaintiff is not entitled to recover anything from the defendant.

26. The defendant further alleges that the defendant has never at any time wrongfully denied any liability, nor made any wrongful assertion of its rights, nor done anything to mislead or which did mislead either the insured or the plaintiff; that it has never in any way waived the provisions of the said policy, nor done any of the acts alleged by the plaintiff, which would estop it from now denying liability.

27. That the provisions of the policy requiring the premiums to be paid, as hereinbefore set out, and the provisions of the said policy as to the furnishing of satisfactory proofs of disability while the policy is in full force and effect and before any default in the payment of premiums and the making of claim for such

disability benefit at said times, all of which has been hereinbefore fully set out, are conditions precedent to the right of the plaintiff to recover any of the benefits sued for.

The premises considered, the defendant prays that the plaintiff take nothing against it, and that it go hence and recover its costs.

WILSON, RANDAL & KILPATRICK,
Attorneys for Defendant.

47 State of Illinois,
County of Peoria.

G. B. Patterson being first duly sworn, on his oath says:

I am the President and duly authorized agent of Peoria Life Insurance Company of Peoria, Illinois, and the facts stated in the foregoing amended answer are within my knowledge true.

G. B. PATTERSON.

Subscribed and sworn to before me, this 18th day of June, A. D. 1930.

ALBERT E. STREITMATTER,
Notary Public, Peoria County, Ill.

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48 ORDER OVERRULING DEFENDANT'S GENERAL DEMURRER AND SPECIAL EXCEPTIONS.

Filed June 25, 1930.

(Caption Omitted.)

On this the 23rd day of June, 1930, the defendant's general demurrer and special exceptions to plaintiff's

First Amended Original Petition were duly presented to the Court, and the same having been considered, the Court finds that the same should be and are hereby overruled, to which the defendant duly excepted.

JAMES C. WILSON,
District Judge.

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49 PLAINTIFF'S TRIAL AMENDMENT.

Filed June 25, 1930.

(Title Omitted.)

To the Hon. Jas. C. Wilson, Judge of said Court:

Now comes plaintiff, and with leave of Court files this the plaintiff's trial amendment to be added to plaintiff's amended petition, and for such amendment says:

That if plaintiff is not entitled as beneficiary to recover disability benefits that were payable to insured prior to his death, she and Adel Bergholm, their only child, are sole heirs of insured, and entitled to such benefits, and since said Adel Bergholm is a minor, plaintiff sues in her own right as such heir for herself and as next friend for said minor, and adopts allegations of amended petition, and asks that she recover for herself and child such benefits as heirs, in event she be denied recovery as beneficiary.

BEAN & KLETT,
Attorneys for Plaintiff.

50 PLAINTIFF'S REQUEST FOR INSTRUCTED VERDICT.

Filed June 25, 1930.

(Title Omitted.)

To the Hon. Jas. C. Wilson, Judge of said Court:
Now comes plaintiff and moves the Court to instruct the jury to return a verdict in favor of plaintiff.

BEAN & KLETT,
Attorneys for Plaintiff.

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51 DEFENDANT'S REQUEST FOR INSTRUCTED VERDICT.

Filed June 25, 1930.

(Caption Omitted.)

Now comes the defendant, after both sides have rested, and before argument of the case, and before the Court has submitted to the jury any charge, and requests the Court to instruct the jury to return a verdict in its behalf and against the plaintiff in substance as follows:

You are instructed to return the following verdict:

We, the jury, find for the defendan this case and against the plaintiff that the plain nould recover nothing from the defendant.

WILSON, RANDAL &
KILPATRICK,
Attys. for Defendant.

The foregoing request for a directed verdict was duly presented to the Court and refused, to which the defendant duly excepted, and is hereby allowed as a Bill of Exception.

JAMES C. WILSON,
District Judge.

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52 VERDICT OF THE JURY.

Filed June 25, 1930.

We, the jury, find that the policy sued on was in full force and effect at all times from and after the date of its issuance to the time of the death of the insured, and the defendant is liable thereon; that the defendant became indebted on said policy to the plaintiff in the sum of $5,000.00, which by the terms of the policy became a trust fund for the plaintiff bearing interest at the rate of 3½% per annum from and after June 1, 1929, and payable to the plaintiff in monthly installments of $50.00 each beginning June 1, 1929; that eleven of said installments of $50.00 each are past due and unpaid, and the plaintiff is entitled to recover from the defendant for said eleven unpaid installments amounting to $650.00 with 6% interest thereon from the maturity of said installments amounting to $19.50, and a statutory penalty of 12% on said unpaid installments and interest amounting to $80.00, and amounting in all to $749.50, which shall draw 6% interest from date; that plaintiff is also entitled to recover statutory reasonable attorney's fees of $2,000.00, which shall draw 6% interest from date; and that plaintiff and her minor daughter, Adel Bergholm, by her next friend, Mrs. Iris Christine Bergholm, are entitled to income disability benefits payable to the

for the reasons set out in the preceding paragraphs; and for the further reasons that there is no evidence that any demand was ever made by the deceased for disability benefits; there is no evidence that the plaintiff ever made any demand for monthly payments on the death benefits, but did make demand for the payment of the sum of $5000.00 in a lump sum; that no demand was ever made on the defendant for the benefit of the plaintiff, Adele Bergholm, a minor; that the jury is not instructed to find the statutory penalty on the amount claimed for disability benefits, and the plaintiffs are, therefore, not entitled to the attorney's fees for the recovery of such benefits; that the plaintiff sued for $2000.00 attorney's fees for recovery of both disability benefits and death benefits, and is by such charge allowed recovery of attorney's fees for both.

4. The defendant excepts to that portion of the Court's charge wherein the jury is instructed to find:

"That plaintiff is also entitled to recover statutory reasonable attorney's fees of $2000.00, which shall draw 6% interest from date";

because such sum is greatly excessive, the amount awarded to the plaintiff on the policy being only $1773.50, which sum includes statutory penalties of 12%, whereas the amount of $2000.00 allowed for attorney's fees is greatly in excess of such amount, and is not sustained by the pleadings or the evidence, in that the pleadings pray for the sum of $2000.00 attorney's fees based on the prayer for $5000.00 death benefit, and $650.00 disability benefit, with 12% statutory penalty and interest, and the proof of the reasonableness of the attorney's fees is based on the anticipated recovery of such sums.

55 5. The defendant excepts to that portion of the Court's charge wherein the jury is instructed to find:

"That plaintiff and her minor daughter, Adel Bergholm, by her next friend, Mrs. Iris Christine Bergholm, are entitled to income disability benefits payable to the insured for the period of time from and including November 1, 1927, to April 1, 1929, amounting to $900.00, with 6% interest on each of said installments from the maturity thereof, amounting to $124.00, and amounting in all to $1024.00, with 6% interest thereon from date";

for the reasons hereinbefore set out.

6. The defendant excepts to that portion of the Court's Oral Instructions to the jury and his Opinion, which are in effect findings of fact, wherein the Court states:

"The plaintiff has offered a great many witnesses to the effect that the deceased, insured, by the policy was, even though it was not known until near the time of his death, was as a matter of truth totally and permanently disabled for sometime prior to the expiration of the grace period, and there is no evidence offered by the defendant that contradicts that testimony. In other words, the jury could not reach but one conclusion under this evidence as to this disability of the insured, and that would be that he was totally and permanently disabled from in the spring or early summer of 1927 on to the time of his death; and the Court holds that that is the effect of the testimony";

and especially to that portion of it in which the Court states that there is no evidence offered by the defendant

that contradicts that testimony, because the letters from the plaintiff and the deceased to the defendant not only do not show that the insured was disabled, but tend strongly to show that he was not totally disabled at that time, and show that he was doing his work, and that as an insurance-man, acquainted with the business and the terms of his policy, he had deliberately declined to make any proof of disability or make any claim for same.

7. The defendant excepts to that portion of the Court's Oral Instructions and Opinion wherein it is stated:

"Whenever a man takes an insurance policy and pays his money for it, that he is to be paid in the event of death, or in the event that he becomes totally and permanently disabled, on condition precedent, though it may be ever so deliberately provided for in the policy, that will defeat the very aims of the insurance, as in this case, would defeat the monthly payments, and also defeat the $5000.00 principal, provided then it is the policy of the law, and I think it ought to be the policy of the law, that any such provision shall be treated as a nullity as ineffectual, that the law will just simply take a commonsense view of the matter, as the Courts are with respect to this, and say, as they have, and as I think should be said in this case, that the event provided for to make this policy payable, was not the furnishing of proof, satisfactory proof, but the event was the death of the insured or his becoming totally and permanently disabled";

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for the reason that the policy itself is a contract, and so states in its face, and the deceased was an experienced insuranceman, and the evidence shows that

he was acquainted with the provisions in his policy, and the Courts will not undertake to declare such a contract a nullity or to re-vrite the contract for the parties.

8. The defendant excepts to that portion of the Court's Oral Instructions and Opinion in which it is stated:

"In other words, they both had the view that the words of the policy meant exactly what they said; that even though the insured was permanently and totally disabled, even though the end of the disease should conclusively show that, yet it was incumbent upon them to furnish these proofs before the expiration of their grace period, otherwise they would forfeit the policy; and it is undoubtedly their view, or was, that this policy had forfeited and that they had lost the insurance. Their expressions in the letters of both of them would clearly indicate that. Yet, I hold that their misguided view about that question in no manner militated against them and defeated them of their rights under this policy. That is a question of law. That simply is this: That they were ignorant about the law, if the Court here is correct in its holdings here, and if the Supreme Court of this State is correct and these Federal Courts are correct. That was simply ignorance on their part, and under no process of reasoning could their ignorance or should their ignorance defeat their claim under this policy;"

for the reason that such holding absolutely disregards the terms of the policy sued on.

9. The defendant excepts to that portion of the Court's Oral Instructions and Opinion wherein it is stated:

"The fact that he (Thos. A. Stamp, defendant's General Manager), shows that he was posted as to the course of his disease, and knew practically as much about it as the wife of the insured did,"

because the evidence not only does not prove this to be a fact, but the letters written by the said Stamp to deceased and the plaintiff show that he did not know that the deceased was disabled; did not know he was seriously and permanently ill, but that incidental to the deceased's business of writing insurance for the defendant the General Manager was
57 advised occasionally that the deceased was occasionally ill; and because the letters written by the deceased and by the plaintiff to said General Manager not only do not disclose such disability but say nothing about it and report work done by deceased.

10. The defendant excepts to that portion of the Court's Oral Instructions and Opinion wherein it is stated:

"The jury will be instructed to find a verdict for the plaintiffs for the amount of these monthly payments which accrued prior to the death of the deceased, and for the $5000.00, and for the penalties provided under the laws of Texas, for the failure on the part of the defendant to promptly pay this insurance. The only evidence as to the fee being that of counsel for the plaintiff that the services were reasonably of the value of $2000.00, there being no evidence to contradict it, and I believe, as a penalty, 12% is provided,"

for the reasons hereinbefore stated.

11. The defendant excepts to the Court's Charge wherein the jury is instructed to return a verdict for

any amount in favor of the plaintiffs and against the defendant, because the uncontroverted testimony shows that the policy sued on provided that it would cease and terminate on failure to pay any premium when due, and that the premium due on August 27, 1927, was never paid, and that the policy provides that to entitle the insured to any disability benefits proof and claim must be made therefor before any default in the payment of any premium, and that no proof and claim was ever made until long after the policy had terminated, and that the policy was terminated at the time of the insured's death.

The defendant, without waiving its request for an instructed verdict, and still insisting on same, requests the Court to amend and correct his Charge and Instructions in accordance with the foregoing exceptions and objections, and tenders the same as a Bill of Exceptions.

WILSON, RANDAL &
KILPATRICK,
ROSCOE WILSON,
J. I. KILPATRICK.

58 The foregoing exceptions were duly presented to the Court at the conclusion of the Court's Charge and Instructions to the jury and were then overruled.

JAMES C. WILSON,
District Judge.

59 FINAL JUDGMENT.

Filed June 25, 1930.

Be it remembered that on the 23rd day of June, 1930, the above styled and numbered cause was called for trial, and came the plaintiff, Mrs. Iris Christine Bergholm, a widow, in person and by attorney, and also the defendant, Peoria Life Insurance Company of Peoria, Illinois; by attorney, and both sides announced ready for trial, and a jury of twelve men having been duly sworn and impaneled to try the case according to law, at the conclusion of the evidence on June 25, 1930, the plaintiff asked permission to file trial amendment for herself and Adel Bergholm, a minor, by said Iris Christine Bergholm as next friend, and the Court permitted said trial amendment to be filed, and the Court re-opened the case and allowed the defendant to introduce more evidence, and thereupon the defendant stated to the Court that it had no objection to the filing of the trial amendment and had no other evidence, and thereupon the plaintiff and defendant each filed with the Court a written request for peremptory instruction to the jury, each party requesting a verdict in his favor, whereupon the Court instructed the jury to return a verdict in favor of the plaintiff, and thereupon the jury retired and immediately, thereafter, to-wit, on June 25, 1930, returned into open Court their written verdict received and filed and reading as follows:

60 "We, the Jury, find that the policy sued on was in full force and effect at all times from and after the date of its issuance to the time of the death of the insured, and the defendant is liable thereon; that the defendant became indebted on said policy to the plaintiff in the sum of $5,000.00, which by the terms of the policy became a trust fund for

the plaintiff bearing interest at the rate of 3½% per annum from and after June 1, 1929, and payable to the plaintiff in monthly installments of $50.00 each beginning June 1, 1929; that eleven of said installments of $50.00 each are past due and unpaid, and the plaintiff is entitled to recover from the defendant for said eleven unpaid installments amounting to $650.00 with 6% interest thereon from the maturity of said installments amounting to $19.50, and a statutory penalty of 12% on said unpaid installments and interest amounting to $80.00, and amounting in all to $749.50, which shall draw 6% interest from date; that plaintiff is also entitled to recover statutory reasonable attorney's fees of $2,000.00, which shall draw 6% interest from date; and that plaintiff and her minor daughter, Adel Bergholm, by her next friend, Mrs. Iris Chistine Bergholm, are entitled to income disability benefits payable to the insured for the period of time from and including November 1, 1927, to April 1, 1929, amounting to $900.00, with 6% interest on each of said installments from the maturity thereof, amounting to $124.00, and amounting in all to $1024.00, with 6% interest thereon from date.

"This the 25th of June, 1930.
W. T. MOORE, Foreman."

And the Court finding that the law and the facts are with the plaintiffs and that they are entitled to recover in accordance with said verdict, said verdict is here and now adopted and specifically made and entered as a part of the judgment of the Court.

It is therefore ordered, adjudged and decreed by the Court that plaintiff, Mrs. Iris Christine Bergholm, do have and recover of and from the defendant, Peoria Life Insurance Company of Peoria, Illinois, the sum

of Two Thousand Seven Hundred Forty-nine and 50/100 ($2,749.50) Dollars, with interest thereon from date at the rate of 6% per annum, and that plaintiff, Mrs. Iris Christine Bergholm, and Adel Bergholm, a minor, by her next friend, Mrs. Iris Christine Bergholm, jointly recover of and from the defendant, Peoria Life Insurance Company of Peoria, Illinois, the sum of One Thousand Twenty-four and no/100 ($1024.00) Dollars, with interest thereon from date at the rate of 6% per annum, for which let execution issue as provided by law.

It is hereby ordered and specified that this judgment fixes the liability of defendant upon said policy for the face thereof, as stated in the foregoing
61 verdict, and awards recovery for such installments thereon as have matured to date hereof as stated in said verdict, and that this judgment and award of recovery shall not prejudice the right of the plaintiff, Iris Christine Bergholm, to sue for and recover unmatured installments as and when they become payable monthly hereafter under the terms of said policy, in the event the defendant fails and refuses to pay such installments.

In open Court the defendant then and there duly excepted to the judgment of the Court and gave notice of appeal to the Honorable Circuit Court of Appeals for the Fifth District, at New Orleans, La.

JAMES C. WILSON,
Judge Presiding.

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62 ORDER EXTENDING TIME.

Filed July 18, 1930.

(Title Omitted.)

On this 25th day of June, 1930, judgment having been rendered herein in favor of the plaintiffs and

against the defendants, on application of the defendant and on showing that the present term of this Court did not afford sufficient time to prepare and have approved the transcript and bill of exceptions in the case, it is ordered by the Court that the term of the Court is extended for a period of ninety (90) days from entry of judgment in this case, within which extended time the parties shall have the right to have prepared, approved and filed, transcript of the record and bill of exceptions. In other words, the time for filing such transcript and bill of exceptions is hereby extended for such period, and the Court will be deemed open for that purpose for the period stated.

JAMES C. WILSON,
Judge, United States District Court.

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66 DEFENDANT'S BILL OF EXCEPTIONS.

Filed Aug. 25, 1930.

(Title Omitted.)

Be it remembered that on the trial of this cause on the 23rd day of June, 1930, before announcement of ready for trial, there came on to be heard before the Honorable James C. Wilson, Judge of the Court, presiding, both parties appearing by counsel, the defendant's general demurrer and special exceptions to plaintiffs' Amended Petition, and the Court after hearing such demurrer and special exceptions overruled the same, the said general demurrer and special exceptions as contained in defendant's answer being here referred to and made a part hereof, and each and all were overruled by the Court and the defendant

insured for the period of time from and including November 1, 1927, to April 1, 1929, amounting to $900.00, with 6% interest on each of said installments from the maturity thereof, amounting to $124.00, and amounting in all to $1024.00 with 6% interest thereon from date, and we find for plaintiff in the above amount.

This the 25th day of June, 1930.

W. T. MOORE, Foreman.

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53 DEFENDANT'S EXCEPTIONS TO COURT'S CHARGE.

Filed June 30, 1930.

(Title Omitted.)

Now comes the defendant and excepts to the Court's Charge and to the Court's findings of fact and conclusions of Law, as follows:

1. The defendant excepts to that portion of the Court's charge wherein the jury is instructed to "find that the policy sued on was in full force and effect at all times from and after the date of its issuance to the time of the death of the insured, and the defendant is liable thereon," because the policy sued on provides that failure to pay premiums when due causes the policy to cease and determine; it provides that the policy with the application is the entire contract between the parties. It is admitted that the deceased failed to pay his quarterly premium which was due on August 27, 1927. The policy provides that to entitle the insured to the disability benefits satisfactory proof of his disability and claim for the bene-

fits must be made while the policy is in force and effect and while no premium is in default. There is no evidence of any claim made for benefits until April 5, 1928. There is no evidence of any proof of disability made at any time until April 5, 1928. The policy had therefore ceased and determined long prior to April 5, 1928.

2. The defendant excepts to that portion of the Court's charge wherein the jury is instructed to find:

"That the defendant became indebted on said policy to the plaintiff in the sum of $5000.00, which by the terms of the policy became a trust fund for the plaintiff, bearing interest at the rate of 3½% per annum from and after June 1, 1929, and payable to the plaintiff in monthly installments of $50.00 each, beginning June 1, 1929; that eleven of said installments of $50.00, each, are past due and unpaid, and the plain-
54 tiff is entitled to recover from the defendant for said eleven unpaid installments amounting to $650.00, with 6% interest thereon from the maturity of said installments amounting to $19.50, and a statutory penalty of 12% on said unpaid installments, and interest amounting to $80.00, and amounting in all to $749.50, which shall draw 6% interest from date.";

for the reasons set out in the preceding paragraph.

3. The defendant excepts to that portion of the Court's charge wherein the jury is instructed to find:

"That plaintiff is also entitled to recover statutory reasonable attorney's fees of $2000.00, which shall draw 6% interest from date";

disclosed an extensive involvment of his lung and pleural cavity, with puss formation. Mr. Bergholm was not able to work after May 12th, 1927. If he did any work at all after this time I did not know of it.

I do not know anything about any compensation that he received after April, 1927. Mr. and Mrs. Bergholm came to the office with people for life insurance examinations. I am not sure whether this was before or after the first examination, but she did quite a bit of the talking and helped him in his work. He was married and one or two children, but I am not sure how many. He was not able to make a living for them after he became sick. I don't believe he was able to write any insurance to speak of so far as I know after he became sick. His wife did bring up some applications and had some people examined, and maybe he come up once in a while, but his wife seemed to do quite a bit of this work. He subjected
69 himself to examinations and operations that we recommended, and carried out our instructions as nearly as possible. He never did disobey any of our orders or instuctions that I ever knew of. We do not make calls to people's residences, and I understand that several doctors were called to see him. I do not know now what cities Mr. Bergholm went to, nor to all the sanitariums, but he did go to some soldiers home I believe in Wisconsin. Mr. Bergholm had an abscess of the lung and pleural cavity. We base our opinion, that is I base mine on, our X-Ray examination, the physical examinations of him and our operation. We removed a portion of his rib in order to drain the puss from his chest and drained large quantities of puss from his lung and pleural cavity. We made repeated microscopical examinations for tubercular germs and were unable to find any. We never did find any trace of tubercular trouble.

Mrs. Bergholm, the wife of Mr. Carl Oscar Bergholm, taught school after Mr. Bergholm became sick.

3. The plaintiffs then offered in evidence the following testimony of DR. D. P. JONES, from his deposition taken by the plaintiffs:

My name is D. P. Jones. I am 37 years of age and my address is Plainview, Texas. I am a physician. I am not associated with any concern. I was acquainted with Carl Oscar Bergholm. I knew him some time before I began treating him. I don't remember the time I became acquainted with him. I treated him quite a while, and I knew him fairly well before I began treating him. I remember going to treat his daughter Nov. 30, 1926, and that is the first time I remember of meeting him. My acquaintance with him was sufficient that I could
70 judge as to his physical condition and appearance. He was in the insurance business. I treated his family from November, 1926, on. I treated him some. I saw him when he first got sick. The nature of my association with him was as a physician treating him and his family. Based on the acquaintance, observation and association related by me, I could and did become acquainted with him to such an extent that I saw and compared the condition of his health prior to April, 1927, with the condition of his health on and after April 1927. He appeared to be a healthy man before he got sick in April, 1927. He appeared to be in good health prior to the first time I treated him. The first time I was called to see him was May 17th, 1927. Prior to that time his health appeared to be good. After that time he was sick all the time. He never was, to my knowledge, able to do any work after that time. He was up some of the time but was never able to do any work of any kind that I know of. Up to the time he became

sick he had the appearance of an active, industrious and able-bodied man. After he became sick he could not work or make a living. From the time he became sick up to the time of his death he was sick all of the time. I base the statement that he was unable to work upon his appearance and physical examinations I made of him. So far as I know he never worked any after April, 1927, when he became sick. He received no compensation that I know of for any work after April, 1927. I do not know what efforts he made, if any, or seemed to make towards trying or wanting to work. He just wasn't able to work. He had a wife and daughter is all I know of. He did not appear to be able to make a living for them after he became sick. He was not able to write insurance for anybody after he became sick. To recover from his sickness he did all that he could. He had doctors treat him; he went to hospitals; he followed directions given him
71 by doctors. He consulted me; Dr. McClendon; Dr. Nichols and Dr. Guest and Dr. Hansen. He went to the Plainview Sanitarium. I do not know of the others. He had bronchiectasis. He had an abscess of the lung. He did not have tuberculosis. I am positive of that. Mrs. Bergholm taught school after Mr. Bergholm became sick.

Mr. Bergholm and his family moved into the home of Mrs. Bergholm's parents. Mrs. Bergholm and her mother are all I know of who waited on him during his sickness.

4. The plaintiffs then offered in evidence the following testimony of DR. E. F. McCLENDON, from his deposition taken by the plaintiffs:

My name is E. F. McClendon; my age is 63, and my place of residence is in Plainview, Hale County, Texas. I am a physician and surgeon. I am not associated with any association. I am County Health

Officer for Hale County. I was acquainted with Carl Oscar Bergholm. I can not state definitely when and where I became acquainted with him, but the first time I remember meeting Mr. Bergholm was at a meeting of the Masons in my office. Mr. Bergholm and myself were both Masons and for years the Masons have held an annual meeting in my office, and at one of these meetings Mr. Bergholm was present and I remember seeing him there. On April 15, 1927, I made a list myself of those present, and have that list, prepared by myself, of those present and it shows that Mr. Bergholm was present. I know I met him then. It may be that I met him at the meeting in 1926, but I do not find my list of those present in 1926, and cannot say for sure whether he was present or not. I am not sure that this was the first time I meet him or not, but it is my recollection that I had meet him before April 15, 1927. At our meeting on April 5, 1928, Mr. Bergholm was not
72 present and we sent flowers to him at the sanitarium where he was at that time. The meeting in April, 1927, was a meeting of the Knights of Rose Croix. I was not intimately acquainted with Mr. Bergholm prior to June 6, 1927. The first time I was called upon to attend Mr. Bergholm was Ju[illegible] 6, 1927. I went to his father-in-law's home, where he was confined to his bed to see him and he was sick in bed then. That was the beginning of my more close association with him. Up to this time I had not known him well. I visited him again on June 13, 1927. He was sick in bed at this time also at his father-in-law's house. In March, 1928, I examined his sputum to see whether or not he had tuberculosis, and he did not have it. The next time I treated him was just before he died, probable the day before he died. I was in the house when he died. I probably saw him at times not mentioned. I remember seeing him about a week before he died, but was not called

at that time to see him, but was merely passing by where he was staying. He had been away and I had not seen him for a long time. I do not remember seeing him at times not herein stated, but may have. I understood that he was writing life insurance, but he never tried to sell me a policy, nor did I see him try to sell one. I understood that his occupation was writing life insurance, but if he really wrote any during the time I knew him I did not know of it. I had an opportunity to observe him closely before June 6, 1927, and have observed and treated him since then as I have stated. The nature of my association with him was to treat him as a physician. I did not observe his physical condition prior to April, 1927. I cannot state the condition of Mr. Bergholm's health prior to April, 1927. I saw him on June 6, 1927, and at the times and places heretofore mentioned.

73 After I saw him on June 6, 1927, he was not able to do any work to speak of. He was practically an invalid from June 6, 1927 until the time of his death. Of course I did not observe him while he was away, just a while before his death, but during the time he was here is what I speak of. I did see him and treat him, and observe him before he left here, and after he returned, and I am sure his physical condition could not have been good while he was away, basing that on what I knew of him when I saw him. After I learned that he had become sick or his health impaired, Mr. Bergholm was not able to do any work or make a living in my opinion. If a man had come to him he could have written an application, but he was not able to get out and do any amount of work, and was not able to rustle and solicit insurance. I do say that he was unable to make a living from June 6, 1927, to the time of his death. From June 6th, 1927, to the time of his death, I do not consider him physically able to support himself and family. He was not physically strong enough

to work. I base my answer on my examination of him. He never did any work after June 6, 1927, that I know of. I do not know of any compensation that he received. I don't know whether he strived, or tried or wanted to work, but if he had wanted to he was not physically able to.

He had a wife and daughter. He did not appear to be able to make a living for them after my first examination which was June 6, 1927. He was not able to write any insurance to speak of, so far as I know. I know that he had me to treat him. He always made every effort to do what was told him should be done. His wife also did everything she could, and they both followed my instructions as to what should be done. Mr. Bergholm was anxious to get well. I understand that he used other doctors, that he was in the sanitarium here, and that he went north for his health. I understand that he used other
74 doctors before and after June 6, 1927. I understand that he had Dr. D. P. Jones, and the doctors of the Plainview Sanitarium. He went to the Plainview Sanitarium, Plainview, Texas, and some sanitariums in the north, but am not sure which ones. Upon my examination, and after a careful one, my diagnosis was that he had Chronic Bronchitis and bronchiectasis. In March 1928 I made a microscopical examination of his sputum for tuberculosis, but found no tubercular bacilli. I do not consider that he had tuberculosis, at that time. Mr. Bergholm coughed most all the time. This was why I made the examination for tubeculosis. He also had an abscess in one side which was discharging at the time of his death. I understand that Mrs. Bergholm taught school after Mr. Bergholm became sick. Mr. Bergholm and his family moved into the home of Mrs. Bergholm's parents. His wife and his wife's family, and also some of the neighbors waited on him and helped to wait on him during his sickness.

5. The plaintiffs then offered in evidence the following testimony of R. A. UNDERWOOD, from his deposition taken by the plaintiffs:

My name is R. A. Underwood; I am of legal age; my place of residence is Plainview, Hale County, Texas. I am active Vice-President of the First National Bank of Plainview. I was acquainted with Carl Oscar Bergholm. I became acquainted with him shortly after he moved to Plainview, but I can not give the dates. I had reasonably close contact with him. He was in the bank frequently and I saw him at church often, and sometimes meet him on the street. My association was of such nature and such extent that I could judge as to his physical condition in a general way. My opportunity for watching and observing his health and physical condition from the time I became acquainted with him to the
75 time of his death was casual business and personal contacts as I have stated. I had no close connections whatever. I know the condition of his health prior to the time he took sick, as compared to what it was after he took sick. When I first knew Mr. Bergholm he appeared to be in good general health. After a while, I do not know the date, or dates, he began to go down in health. His condition later on was very bad apparently. Up to the time he became sick he had the appearance of an active, industrious and able-bodied man during my acquaintance with him. He seemed to me to be entirely incapable of executing any business of any kind. It's impossible for me to explain the nature and causes of his physical difficulties. But my observation indicated that he had lack of life, or vigor, and a general physical debility. I base my statement on my observations and his conduct. I do not know of his working after he became sick or of his receiving any compensation for work, or of his efforts towards trying or

wanting to work. I don't know whether he was able to write any insurance after he became sick, nor do I know of any insurance that he wrote after he became sick.

6. The plaintiffs then offered in evidence the following testimony of LESTER W. JAMES, from his deposition taken by the plaintiffs:

My name is Lester W. James; my age is 26; I live in Plainview, Texas. I am cashier of the Security State Bank of Plainview, Texas. I was acquainted with Carl Oscar Bergholm. I did some business with him on Dec. 2, 1927, and probably knew him for six or eight months before that, but I cannot give the date exactly. I knew him in a business way, and as I saw him on the street. I had no social dealings with him. I spoke to him on the
76 streets, and saw him frequently. My acquaintance with him was such that I could tell from his physical appearance as to his general health. He followed the life insurance business. He followed that all the time I knew of him doing anything. I never knew of his doing anything but write life insurance. I had some business dealings with him and saw him on the streets at various times. Most of my acquaintance with him was seeing him on the streets. He was in the bank occasionally. I had some business with him. I was interested in him from the standpoint of a customer, and observed him some from time to time partly on this account. I don't think I knew him prior to April 1927, but I cannot say for sure. I never knew him prior to his becoming sick. Every time I ever saw him he appeared to be able just to get around. I did not think he had enough strength to get around or do any work. I never did see him when I thought he was able to work. If he was ever physically able to

work I never knew it. I base my opinion that he was unable to work, upon my observation of his person; his apparent weakness; he was very thin, that is he did not appear to be robust, but on the contrary appeared to be very weak. His general appearance and conduct, and the manner of his getting around let me to the conclusions reached. I do not think he worked any, I know of no compensation that he received after April 1927. He may have gotten some from selling insurance. He may have tried to sell a little life insurance, but he could not make much headway at it. He possibly made all the effort he could under his condition. Mrs. Bergholm taught school after Mr. Bergholm became sick.

7. The plaintiffs then offered in evidence the following testimony of J. D. STEKLEY, from his deposition taken by the plaintiffs:

77 My name is J. D. Stekley; my age is 37; my residence is Plainview, Texas. I am Vice President and active manager of the Plainview National Bank. I was acquainted with Carl Oscar Bergholm. I do not remember the exact date I meet him, but I meet him within a few weeks after he moved to Plainview. He came into the bank and made application for a loan and also met him in a Sunday School class which I am teaching as they joined the same soon after their arrival here in Plainview. I knew that he was in the insurance business as he so stated this when he made the application for the loan. He was in the insurance business all the time he was here and for a time was also leader of the bank at this place. I had good occasion to know about his health from seeing him when he was in attendance at the Sunday School class, and hearing the reports concerning him when he was not there. I noticed from Sunday to Sunday his failing condition.

He appeared alright to me up until the time of his illness. I do not remember the nature of his illness. I don't know whether he was able to write any insurance to speak of after he became sick.

8. The plaintiffs then offered in evidence the following testimony of MRS. N. A. WHEELER, from her deposition taken by the plaintiff:

My name is Mrs. N. A. Wheeler. My age is 39. My place of residence is Plainview, Hale County, Texas. I am keeping house. I am a house wife and have a family. I was acquainted with Carl Oscar Bergholm. I became acquainted with Mr. Bergholm and also his wife, shortly after they moved to Plainview, probably in 1926. It must have been that year. I met her at Lamar School. Mr. Bergholm was at our house one time and I met him there. I saw
78 him quite often after that. After I met Mr. and Mrs. Bergholm we became close personal friends. We visited in their home and they visited in ours. Mrs. Bergholm roomed at my house for a while, and after that stayed at our home often and Mr. Bergholm was there often. I knew both Mr. and Mrs. Bergholm well, and saw them frequently. I could judge the condition of Mr. Bergholm's health from his physical appearance. He was writing life insurance when I knew him, and also in April, 1927. He and his wife visited in our home often. We visited in their home often. I visited him in the hospital. I was present when he died, and sat up all night with him the night he died. While he was gone she stayed with her mother, and just before he died they moved into one of my mother's apartments where he died. We visited as friends. Based on my acquaintance, observation and association as related by me I was acquainted with him to such an extent that I saw and compared the condition of his health

then and there in open Court excepted to the action of the Court in overruling the defendant's general demurrer and its said special exceptions.

Be it further remembered that thereafter on said date, said cause came regularly on for trial and a jury was duly impaneled, and the following proceedings were had:

1. The plaintiffs offered in evidence the policy sued upon, which policy is attached to the plaintiffs' Amended Petition and is marked "Exhibit No. 1", and is copied into the record filed in this cause and is here referred to, in lieu of again copying the said policy in full.

2. The plaintiffs next offered in evidence the testi-
67 mony of DR. E. O. NICHOLS, as contained in his deposition, taken by the plaintiffs, as follows:

My name is E. O. Nichols; age 44. I live in Plainview, Hale County, Texas. I am a physician and surgeon, connected with the Plainview Sanitarium as Chief Surgeon. I have been with this sanitarium since 1917. I was acquainted with Carl Oscar Bergholm. I got acquainted with him about March 1927 in Plainview, Texas. He brought insurance cases up to the office about March, and probably April, 1927. That was to be examined for life insurance, the people he brought in were to be examined for life insurance. He must have been in our office a half dozen times in March and April, 1927. Then on May 12, 1927, Mr. Bergholm was examined by us in our office. This examination consisted of a physical examination of his body with special reference to his chest. At that time he was coughing and spitting up puss; the sputum did not show any tubucular germs. Then on

June 28th, 1927, we x-rayed his chest, and then on March 28th, 1928, we operated upon him. He remained in the hospital at that time for 18 days. After he went north he came back in and we made another examination of him. He was in the insurance business at those times. I was associated with him as an examiner of life insurance applicants and as a physician. I became acquainted with him to such an extent that I saw and compared the condition of his health prior to April, 1927, with the condition of his health after April, 1927, and based on the acquaintance, observation and association related by me, I state the following: When I first knew Mr. Bergholm, he did not look like a robust man, but I never knew of anything wrong with him. I really paid no attention to his physical condition prior to May 12, 1927. His physical condition was worse after May 12, 1927, than it was before. As before stated we examined him on May 12, 1927, then I again examined
68 him on June 28, 1927, and then he was in the hospital 18 days on and after March 28th, 1928. There were many times in between these times that he was treated in this hospital and when he was treated at our office, but on many occasions Mr. Guest treated him. Dr. Guest was a surgeon in this hospital at that time, and Mr. Begholm was really in his care more than mine. Mr. Bergholm did not have a robust appearance when I first knew him. He had the appearance of being an active and industrious man prior to the time he became sick. He was trying to work. From and after our examination on May 12, 1927, Mr. Bergholm was not able to work nor to make a living. Mr. Bergholm's condition grew progressively worse from the time we first examined him up until his death, due to an infection in his lungs and plural cavity. He was unable to work during this time. He was unable to work because of our physical and x-ray examination of him, which

health. I could tell about that from his physical appearance. I was associated with him a great deal. I probably saw him every day he was able to walk around. I saw him several times in bed, at the home of Mrs. Berghom's parents where Mr. and Mrs. Bergholm were living, and I visited him one time in the Plainview Sanitarium at Plainview, Texas. He was trying to sell insurance. Selling insurance was his business or occupation. I saw him very often. We were friends, and he would come in the store and talk with me. He was not able to work, and when I was not busy we just sat around and talked. I visited him when he was sick in bed sometimes, because we were friends. I did not know him prior to April 1927, but from April 1927 until the time he died, his condition steadily grew worse. I did not know him prior to April, 1927, but after that time when he was physically able to walk around, I probably saw him every day.

81 Of course there were time since 1927 that he was absent from Plainview, and I did not see him then. The times I saw him was while he was in Plainview, Texas.

Mr. Bergholm was very short of breath. When he would walk around a little he would have to sit down and rest. He looked very bad, and had the appearance of being in very poor health. He would become very easily fatigued, and could not exercise for any length of time at all. He coughed a great deal. He spit up a great deal of mucus. When he would come into the store his breath was very bad. It had a bad odor. He was very thin. On his physical appearance, his apparent lack of breath; his coughing; his general weakness; his being unable to get around much without becoming very tired, that is what I base my statement on. When he did walk he would have to walk very slowly, and he could not walk long at a time without sitting down to rest. Mr. Bergholm worked for me one Saturday afternoon. He did not do much

work. He needed the money, and I just employed him to sorter stick around and see about things. I liked him and wanted to help him out all I could. He would sell goods at intervals. This did not require much physical exertion as he could go and wait on a customer and then sit down and rest when he became tired. I paid him $2.50 for his work that afternoon. My business is selling sporting goods and outdoor clothes, and there are times when business is very dull. Once or twice during the dull season Mr. Bergholm stayed in the store for me while I went out to play golf. This did not require much exertion nor much physical exercise. I remember paying him for that Saturday afternoon just stated, the sum of $2.50. I just gave him some clothes for the afternoon or two he stayed in there while I was out playing golf, but it did not amount to very much though I do not know the exact amount. Mr. Bergholm seemed to want to work, but I never saw him at work. Of course he did stay in my store some as stated above,
but that is all I ever knew of him doing. I
82 never knew of nor heard of, any insurance
he wrote after I knew him. He might have written some, but not to my knowledge. He had a wife and one daughter.

So far as I know he never wrote any insurance after he became sick. Ever since I knew him he was trying to recover. He borrowed a cot from me and used it to sleep on the front porch. He wanted to sleep outdoors to see if that would not help him to recover. He consulted Dr. McClendon and Dr. Nichols and Guest of the Plainview Sanitarium are all that I know of. There were possibly others but I do not know of any more. There were only there that I know of. He went to the Plainview Sanitarium; and a hospital in Munsing, Michigan; and to one in Chicago I believe. Now about the one in Munsing

and Chicago I did not see him there, but he told me he went to these. I saw him in the Plainview Sanitarium.

Mrs. Bergholm taught school all of the time that I knew Mr. Bergholm. They moved into the home of Mrs. Bergholm's parents. I did not know him prior to April 1, 1927.

On Cross Examination.

I did not know him prior to April 1, 1927. I saw him every day he was in Plainview and down town. He nearly always called on me when he was able to get to town. He was sick when I first knew him. I knew he was real bad when he went to the Plainview Sanitarium, but I do not now recall the date of that. That was before he left here and went away, and a long while before he died. His business was selling insurance, during June, July and August, 1927. His business in September, 1927, was selling insurance. I do not know that he worked at it any then, but that was his business had he been able to work at it. His business in December 1927 was selling insurance. If he worked at it any during that month
83 I did not know of it. His business on January 26, 1928, was selling insurance. If he worked at it any then I do not know of it. His business on March 8, 1928, was selling insurance. I never knew of any other business he was ever in after I knew him. If he ever worked at it any after April, 1927, I do not know it, but that was his business. I think he did devote a little time to collecting some notes during the time that I knew him, but I don't know how much time. He was not physically able to solicit insurance. He was able to take applications for insurance. He could not have gone out and stood

around and talked with a man a long time and tried to induce him to take a policy. His physical condition was such as he could not do this.

10. The plaintiffs next offered in evidence the following testimony of R. E. RAMPY, from his deposition taken by the plaintiffs:

My name is R. E. Rampy. My age is 48; my place of residence is Plainview, Hale County, Texas. I am in the oil business, and associated with and work for the Gulf Refining Company. I was acquainted with Carl Oscar Bergholm. It must have been in the summer of 1926 that I became acquainted with him. I know he became sick in the spring of 1927, and I became acquainted with him in the summer preceeding his becoming sick. I first met Mr. Bergholm in our Sunday School Class. We both attended the same Sunday School, and belonged to the same class. I became very well acquainted with him and we became good friends. Then we visited with each other. Me and my family would go to his home and visit with Mr. Bergholm and family, and he and his family would often visit with me and my family. During the time he was in Plainview, and while he was able to have company or to visit at all, there was hardly a week passed without us visiting his family, or him and his family visiting our family. We
84 visited nearly every week with each other while he was in Plainview. He was in the insurance business, that is he sold life insurance. Our family and his visited each other nearly every week. Few times did a week pass that we did not visit each other, that is while he was in Plainview. The nature of my association with him, was just visiting as friends. I could easily compare the condition of his health prior to April 1927, and after April 1927, basing that on my acquaintance, observation and asso-

ciation with him. When I first knew Mr. Bergholm, apparently he was in perfect health. He appeared to be strong and able bodied. I could not tell that there was anything wrong with him. He was able to work, and did work prior to the spring of 1927. I never heard him complain at all of his health until the spring of 1927, and I knew him and visited with him often while he was in Plainview. Mr. Bergholm was an active, industrious and apparently an able bodied man up to the time he became sick in the spring of 1927. After he became sick in the spring of 1927, he was not able to work. Mr. Bergholm was very weak; he walked very slowly; he could scarcely walk at all, and I have seen him walking when I thought and believed, and now think and believe, he was not able to walk. He could scarcely get around. He coughed quite a bit and spit up puss or something of the sort. He was very thin. From the time he took sick in 1927, his condition just gradually grew worse until he died. Mr. Bergholm was physically unable to work, and I base that upon what I saw of him, his appearance, and his general condition. I do not remember of him working any at all. I know of no compensation that he received after April, 1927. He had a wife and one child. He made all the efforts to recover that any sick man could make. He was under the care of competent physicians all the time. He secured what

I think were the best doctors available to

85 treat him, at least as good as were available.

I never knew of his violating any of the doctors instructions, and he seemed to make every effort possible to recover. He slept out on the porch some in an effort to recover. He consulted Drs. Nichols and Guest, and McClendon, and Hansen, that I know of, and I believe Dr. Jones. There may have been others, and I know he was under some while he was away from Plainview. He went away from Plainview for the purpose of going to some other cities and sani-

tariums, but I do not know which ones nor where. I do know he was in the Plainview Sanitarium. He was trying to get into one at El Paso but the papers were not finished when he died. I really do not know of my own knowledge, what disease he had, but he had one or more. Mrs. Bergholm taught school after he became sick. They moved into the home of Mrs. Bergholm's parents.

On Cross Examination.

I became acquainted with him in the summer of 1926. I saw him two or three times a week after April 1, 1927 to the date of his death, except the time he was away from Plainview. He left about July or August of 1928. When Mr. Bergholm first became sick in the spring of 1927, I thought he had a touch of the flu and would possibly be up soon, and it was two or three months after that before I realized that his health was really failing, and that he was in real bad health. If he was in any business I do not know it. The only business he ever had that I knew of while I knew him was writing life insurance, but if he was engaged at that in September 1927 I did not know of it. He was not able to engage in any business then. He had not been since he took sick. His business on December 31, 1927, January 26, 1928 and on March 8, 1928, was writing life insurance, but if he was engaged in it I don't know of it. He was not
86 able. I saw him along about those times but I cannot say that I saw him on any particular date mentioned. As stated before, I saw him two or three times a week while he was in Plainview after he became sick, but I do not recall any of the dates exactly, that is the day, month and year. I can give about the time but not exactly. He did not solicit and take any applications for insurance from April 1927 to March 8, 1928, that I know of. I don't

know how much time he did devote to collecting insurance premium notes during that time. I do not know for what period he conducted the band during that time. He was not physically able to solicit and take applications for insurance in January 1928. He could have taken an application if a man had just come and asked him to write up an application, but so far as soliciting goes he was not.

11. The plaintiffs next offered in evidence the following testimony of MRS. HILDA ERICKSON, from her deposition, taken by the plaintiffs:

My name is Mrs. Hilda Erickson. I am 64 years of age. I live on North Lehman Avenue in Iron Mountain, Michigan. I am the wife of Henry Erickson, and I was acquainted with Carl Oscar Bergholm from his birth in Christina Town, Finland. I saw him continuously from the time of his birth up to the age of nine years and then did not see him again until he was eighteen years of age. After that I saw him nearly every day for a period of four years until he left for Texas. He was engaged as a Night Clerk at the Northwestern Railroad Company prior to the time he left for Munising, Michigan, but I do not know what business he was engaged in in April 1927. From the time he was eighteen years of age and came to this country and at the time he worked as night
87 clerk at the Northwestern Railroad Company his physical condition was very good. I did not see him again until July 1928 when his physical condition was bad and he was in bad health. I saw him several times after that up to some time in February, 1929, and his health was in worse condition, and after that time he returned to the state of Texas. He visited me at my home in Iron Mountain, Michigan, nearly every day of the week during the times he was in Iron Mountain. I was intimately acquainted

with him and compared the condition of his health prior to April 1927 with that after April 1927. Prior to that time he was in good health and when I saw him after that time his health was in bad condition and became steadily worse. The appearance of his health prior to that time showed that he was a healthy man but after that time his appearance was that of a run down and sick person. I did not see him after April 1927 until July 1928 and then saw him on many occasions between that time and some time in February, 1929. I can not give the exact number of times. Prior to his going back to Texas, during the time I saw him, he had the appearance of an active, industrious and able bodied man, and when he returned from Texas, which was some time in July 1928, he had the appearance of being a very sick man. I did not see him do any work at all after he came back from Texas in 1928. After he came from Texas in July 1928, he was a very pale, thin looking man with hardly no color, could hardly walk and it was necessary to assist him in putting on his clothes. He was a complete physical wreck. He was unable to work for that reason. He did not have enough strength to put on his own clothes and he was unable to walk around and had to be continually assisted. He had a hard time to breathe and was physically exhausted from every movement he did make. He did not earn

88 any money from any work from July 1928 until February, 1929. He was unable to make any efforts to obtain work. He had a wife and one daughter. He did not write any insurance after he became sick that I know of. He went through an operation to recover his health in Munising, Michigan. He was suffering from lung trouble which statement I base on the fact that he had hard breathing and complained of pain in his lungs.

12. The plaintiffs next offered in evidence the following testimony of ELMER O. ERICKSON, from his deposition taken by the plaintiffs:

My name is Elmer O. Erickson, age 41 years, residing at Munising, Michigan. I am Manager of the Munising Woodenware Company, Manufacturers of an assortment of woodenwares and veneers in Munising, Michigan. I have been acquainted with the assured, Carl Oscar Bergholm, for the past ten years and over. I first became acquainted with Carl Oscar Bergholm in Munising in about the year 1914. He was a member of the Munising bank with me and I met him while he was teller of the First National Bank of Alger County. He was also a member of the same hunting camp I belonged to. I was personally acquainted with Mr. Bergholm; saw him almost daily for a number of years; knew him before he went in the army and afterwards; he left Munising to live in Texas after the war and at that time he appeared in good physical condition. After returning from the army, in about 1919, he worked again in the First National Bank in the insurance department, as I remember it. Our concern did its banking with the First National Bank and some of its insurance was carried there. Munising is a city of about five thousand inhabitants and I had occasion almost daily from the time of his getting back from the army until he left with his wife, whom he met while on the Texas border, to note his physical appearance. His physical

89 appearance and condition appeared good previous to his going to Texas. He was in the banking business and insurance connected with the First National Bank previous to his leaving Munising after his return from the army in 1919. Upon leaving here, by correspondence from him, he engaged in the insurance business in Texas, working

for Peoria Life Insurance Company, and in April, 1927, he was engaged in that business as far as I know. Almost daily contact with him in a business way at the bank, and in a social way in playing in the same city bank where he played the clarinet and later on the saxophone, and I played the bass horn. First several years of my acquaintance with him began on or about 1914 and he appeared healthy. On our hunting and fishing trips Oscar Bergholm was always able to hold up his end of the outings, which necessitated the carrying of heavy packs, ammunition and provisions, with long walks over rough country. This would be in all seasons of the year. He was good on snow-shoes and Skiis. His general physical appearance appeared in the same good condition until he came back to Munising on or about July, 1928, and from that time on his condition was much changed and he was totally incapacitated from performing any useful labor. The time he came back was in July, 1928, and he was here until he left for the Veterans Hospital in Wisconsin, which is about thirty days before he died as I recall it. His return to Munising was to regain his health, being informed by a doctor in Texas that he needed a northern climate. I have answered, to some extent, this question in the answer to question seven. Personal contact with him over a period of from 1914 to 1929, except those years he was in Texas after leaving the army, and for that period of time he was in the army, I had almost daily contact with him in a business and social way. From July 1928 to on or about the 1st of March, 1929, I visited him and saw him at camp on Island Lake in Alger
90 County, south of Munising. I saw him, visited him frequently at the Munising Hospital and laster at the Beach Inn and Bellevue hotels. I became acquainted with Mr. Bergholm and knew him well enough that I can compare his physical condition, health and general appearance prior to

prior to April 1927 with the condition of his health on and after April 1927, and based on that I state that prior to April 1927, that is to the time he took sick, he was a strong and active man. He appeared to be in perfect health prior to that time. After he became sick he just kept getting worse until he finally died. After he became sick he was in exceedingly bad health. He got around very feebly, and could scarcely go. In fact he was in bed quite a bit of the time. Up to the time he became sick during my acquaintance with him he had the appearance of an active, industrious and able-bodied man. He was a very hard worker, was industrious, and appeared to be able bodied, prior to the time he became sick. After Mr. Bergholm became sick he was not able to work. He did try, but was physically unable to work. I know these things well, for I was about the closest friend Mrs. Bergholm had. He was very weak. He was scarcely able to get around. He had to walk very slowly, just creep around. He coughed a great deal, and would spit up some kind of puss. Anyone who was associated with him like I was could tell that from his appearance. I base what I saw as to his being unable to work, upon my association with he and his wife. I often saw him in bed sick. He coughed something terrible, and his appearance showed without question that he was very weak physically. His physical appearance was such that I could tell by that alone that he could not work. If he ever did any work to amount to anything, I never did know of it. I do know that he did try to work some, and tried, when he was able at all, to get people to take life insurance. He tried when he was very sick and weak to get us to take out some insurance on our little son. He was manager of the band a little while at a time when they were out of an instructor. He just did that to sorter hold the bank together until they could get another instructor after the one they had quit. I

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think he wrote some insurance after he became sick but none to speak of that I know of. I don't know of anybody in particular that he was able to write insurance for after he became sick. He did all he possibly could to recover from his sickness. He had several of the best physicians that could be obtained to wait upon him. He went to the hospital and submitted to some operations. He followed the doctors instructions very closely. I helped wait on him and I know that he took his medicine as it should have been taken. I gave a great deal of it to him myself. He went away to some hospitals away from here. In fact if there was anything he could have done to get well that he did not do I don't know what it could be. Mrs. Bergholm taught school after Mr. Bergholm became sick. They moved in with Mrs. Bergholm's parents, then moved out and tried to get along themselves without help, but could not and finally moved back with her parents again. Mrs. Bergholm, Mrs. Bergholm's father, myself and others and some of the Masons waited on him or helped to wait on him during his sickness.

9. The plaintiffs next offered in evidence the following testimony of W. A. BROWN, from his deposition taken by the plaintiffs:

My name is W. A. Brown; my age is 43; my place of residence is Plainview, Hale County, Texas. I am a merchant with Brown's Outdoor Stores, of Plainview, Texas. I was acquainted with Carl Oscar Bergholm. I became acquainted with him in April, 1927, at the store where I work now, and where I was working at that time. Mr. Bergholm came to the store very often and would sit around. We sat around there and talked very often when I was not busy. My association and acquaintance with him was sufficient for me to tell whether or not he was in good

Club offered him employment but he could not do that. This would have necessitated very little effort on his part but he was unable, as stated before, to do anything. He had a wife and a daughter. From on or about July 15th, 1928, up to the time of his leaving in March, 1929, Mr. Bergholm was unable to write any insurance or to cencentrate. He was physically and mentally incapacitated, because of his physical disability and the pain he suffered, from doing anything useful. Mr. Bergholm was not able to write insurance for anyone after on or about July 15, 1928. He wrote no insurance in Munising after he returned. Mr. Bergholm made every effort to recover from his ailment. He fought hard to regain his health. He followed the doctors instructions and all the advise we could give him. He stayed out at a hunting camp where it was dry, light and airy, and an ideal place for a person to recover his health. He did not drink or abuse himself in any way after his return. He followed the doctors and hospital's instructions and did everything I could see he should do to get well. Dr. R. A. Tearnan here in Munising, and also Dr. T. W. Scholtes, of Munising. From hearsay he had treated with doctors in Texas. He came to Munising from Plainsville, Texas. He was confined in the Munising Hospital for his ailment. From Munising he went to Wisconsin to the Veterans Hospital, and from there to Plainsville, Texas. He had an incision that kept draining in his back and he was continually coughing putrid matter. The following persons waited on him; Henry E. Temple, printer; C. L. Hackathorne, hotel; Mrs. Joseph Lacasse, proprietor

93 Belleview hotel; Dr. R. A. Tearnan, physician; Dr. T. W. Scholtes, physician; Oscar E. Oie, druggist; Edward Bartels, poor commissioner; Miss Jean Macintosh, and nurses at the Munising Hospital; Walter Corey, commander Amer-

ican Legion Post, and a number of others who knew him. All of these parties are at Munishing, Michigan.

As you will understand by the reading of these answers, my information covers particularly that period of time after he came back from Texas in July, 1928, and up to the time he left for the government hospital in March, 1929, and for that period of time he left with his wife to go to Texas, which was after he left the army, he was in good health.

13. The plaintiffs next offered in evidence the following testimony of A. B. THOMPSON, from his deposition taken by the plaintiffs:

My name is A. B. Thompson; age, 41 years; place of residence—National Home, Wis. I am engaged in the practice of medicine and surgery in the service of the National Home for Disabled Volunteer Soldiers. I was not personally acquainted with Carl Oscar Bergholm further than knowing him as a patient in this hospital. Carl Oscar Bergholm was admitted to this hospital on February 10, 1929, and discharged March 18, 1929. My acquaintance with this case occurred during that period, but I do not recall any definite dates that I saw this man. My acquaintance with this case is based largely on reports of ward surgeons, review of observations ordinarily made on patients in this institution. I am a surgeon and physician. I am not licensed to practice medicine and surgery in the State of Wisconsin. I have license to practice in the State of Indiana and Kentucky. I have had such license about fifteen years. I have practiced medicine and surg-
94 ery for about fifteen years, plus. I am a graduate in the medical department of the University of Louisville. Graduated 1914. My

study, practice, and experience have covered and included diagnosis and treatment of diseases and infirmities of lungs and lung area. My study, practice, and experience have been such to enable me to ascertain the cause and existence of such disorders and infirmities in so far as such causes may be ascertained. I am connected with the National Home for Disabled Volunteer Soldiers at Milwaukee County, State of Wisconsin. I have been connected with the National Home for Disabled Volunteer Soldiers of Milwaukee, Wisconsin, since August 15, 1926, as surgeon in charge. Carl Oscar Bergholm was a patient in this institution. Carl Oscar Bergholm was a patient in this hospital from February 10, 1929, until March 18, 1929. I had the opportunity while Mr. Bergholm was in this institution to observe his physical and mental condition. Mr. Bergholm was suffering from physical infirmities. Mr. Bergholm was suffering from chronic pulmonary tuberculosis, far advanced, and a draining sinus from the right plural cavity, resulting from an old empyema. He was considerably underweight and showed evidence of toxemia. Prognosis at that time was poor. Mr. Bergholm's physical condition as previously described was the result of infection in his lung and right plural cavity, with the attending symptoms of toxemia, general weakness, etc., that ordinarily would accompany such a condition. His mental condition was not materially affected other than probably slight irritability, etc., which ordinarily accompanies such conditions. Mr. Bergholm did not work in any way during the time above mentioned. In my judgment, based on observations and acquaintance with the physical condition of Mr. Bergholm, I would consider him unable

95 to perform any kind of work during the above period. Mr. Bergholm was unable to do any character of work because of his physical condition above described. Mr. Bergholm

was not cured or restored to health when he left this institution. Mr. Bergholm had not sufficiently recovered from his illness to be able to work when he left this institution.

14. The plaintiffs then offered in evidence the following letter:

Peoria Life Insurance Company,
Home Office—Peoria, Ill.
Thomas A. Stamp, State Manager.
Earl R. Otta, Cashier.
1510-11 Kirby Bldg., Phone: 7-3678.
Dallas, Texas, May 13, 1927.

Mrs. C. O. Bergholm,
Plainview, Texas.

My Dear Mrs. Bergholm:

I am glad that you like the book. It appealed to me and I thought you would enjoy it. That is why I sent it. It is very attractive and fascinating I think.

We are sorry to hear that Adele has been sick and that Oscar is feeling badly. We hope there is nothing serious and that he will soon be himself again. Please give him our best wishes. I trust that the last half of the month will find him on the job again and that he will be able to write a nice little business. If Oscar could write ten thousand the last two weeks or ten days in May it would do him more good than an operation. We are glad that Oscar is going to see Mr. Peters soon.

We are sending you a couple of calendars for your use there.

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:EO.

15. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria
96 Life Insurance Company:

Dallas, Texas, May 16, 1927.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

We are enclosing copy of letter we have just sent to Mrs. Wimberly, about her policy. I wish that you or Mrs. Bergholm would see her and have a talk with her. I think she was fortunate to get this contract. She is very slightly built, and I think it would be impossible for her to get a standard policy elsewhere.

I hope that you are feeling better this week, and that you will soon be in the rose garden picking your roses for Mr. May. We would be disappointed not to see your name on the list this month.

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:EO.

16. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, May 19, 1927.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

We sincerely hope that you are feeling better by the time this letter reaches you. We hope that your illness was of short duration.
97 We certainly do miss your applications. The roses are coming in mighty fine. They are fragrant and there are lots of them. If we could just hear from you we would feel a lot better.

We hope Oscar, that you will feel well to round out the month of May with a fair production of say about five thousand. Can we count on you for this volume? Five roses would be appreciated by Mr. May and would give you a very nice bank deposit.

We had 54,000 for Perfect Day which was not so bad for Texas, considering our small organization and the fact that we have been here just a year. I know this is true, if we will just work along the right lines with tact and diplomacy and earnestness we are bound to sell. There is every reason why a man should buy insurance. There is every reason why we should sell it.

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:EO.

17. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, May 24, 1927.

Mrs. Oscar Bergholm,
Plainview, Texas.

My Dear Mrs. Bergholm:

We regret very much to hear that Oscar is still ill. We certainly hope that he will recover before many days. Try and not worry about his condition, worry never helps but always hurts. Must be a little bit hard for you in your work.

I know you both regret very much that you are not able to produce in May, but perhaps you can get some thing for ladies day.

98 I think that Mrs. Wimberly has been unfair in her judgment of us in regard to her policy. She was fortunate in getting it, as she is very slender. I gave them subscription to the Independ-

ence when I was there. In fact, we did everything to satisfy and please them. Just do what you can for her and we will rest the case.

You can make the quarterly premium on Oscar's and Adele's policies the 28th, as you suggest. This will be satisfactory to us.

We sincerely hope you will see much brighter days ahead and that Oscar will soon be the job again.

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:MS.

18. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, June 6, 1927.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

We acknowledge check sent in by Mrs. Bergholm for $58.22 in payment of your quarterly premium on your policy, and also Adele's. We thank you for this, and enclose herewith your receipt. Adele's will be forwarded in a few days, as a new one has to be made at the Home Office on the quarterly plan.

We are sorry to learn that you are not able to be out yet. We hope that it will not be long now before you are on your feet again. You heard about the fellow who had worn out his shoes. He said he would soon be on his feet again, but we hope you
99 will be on your feet in a different way. You have had quite a time. We wish we might do something for you.

The thing for you and Mrs. Bergholm to do is to just take a new hold and determine to go right straight

ahead. I have been in some hard places myself and it is surprising what a man can do if he has the will and determination.

We are sending you the Bulletin. We hope you enjoy it. We had a very good May.

With kind personal regards to you all, and with all good wishes, I am,

Yours cordially,
THOMAS A. STAMP,
State Manager.

TAS:EO.

19. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, June 14, 1927.

Mrs. C. O. Bergholm,
Plainview, Texas.

My Dear Mrs. Bergholm:

We have not received any word from the Home Office regarding Roy McLaughlin's policies which were sent in for change of age. We are writing them today to learn what the delay is.

The following renewals have not yet been paid:

A. M. Wimberly	Qtr	$14.96	Due	May 7
Ollibe Graham	Ann	29.05		May 8
R. F. McLaughlin	Ann	9.67		May 26
M. L. Greenhaw	Ann	28.00		May 27
M. B. Greenhaw	Ann	27.62		May 27
M. E. M. Ward	Ann	28.02		May 28
C. E. Ward	Ann	37.72		May 28
100 N. J. Ward	Ann	32.95		May 28

We are enclosing herewith a few renewal notes which you may use, in settlement for the annual premiums. Do not make them for longer than four

months' from the due date of the premium. It will be necessary to collect at least 10% of the premium in cash before we can accept a renewal note, on second year premiums. In cases where the premium is more than 30 days past due, it will be necessary to complete a health certificate, which is enclosed herewith.

Please do what you can to collect these premiums. Also send us the nets and interest on the Ward policies. These are now long past due, and are the only items of 1926 business that have not been taken care of, and we are anxious to get them cleared up.

We are sorry that Oscar has been under the weather and hope that he is feeling much better now. Any service you can give us in collecting these items will be greatly appreciated.

Yours very truly,
ERO. EARL R. OTTA, Cashier.

20. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, July 2, 1927.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Oscar:

We are enclosing an attractive leaflet "What life insurance will do for you." It is one of the best things I have seen. Hope you will enjoy reading it and that it will help you in your business
101 for July.

We were glad to get your letter the other day. We are glad that you are still living and that you are not going to join the angels for a little while. I guess you and I, Oscar, have a little more work to do before St. Peter will let us in the gates of pearl.

Here's hoping that we shall make a little better preparation and that we shall build up a little larger estate before the sunset.

We were sorry to have you lose out in May, and also very sorry you have been so sick. We trust that you will improve very rapidly and will yet be able to write some business in July. This is the second day. As soon as you feel a little stronger, the effort you will make may do you good. It will take your mind off yourself.

I was talking to a Mr. Wolf on a bus this week. He spoke of you folks. From what he says your county is in about as good condition as any county in the State. He thinks the prospects there are wonderful. I think when you get better if you would just work that county you would gain in a big way. Think of the crops of wheat and celery and garden truck that will be raised there this fall.

Hope you are enjoying the "Spirit of Texas" and that we shall hear from you again soon.

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:EO.

21. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, July 9, 1927.

102 Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

July has started well with us. The production is fine. I guess the celebration on the 4th did us all good. Let us aim to close the month with at least a quota of $100,000. We hope that the "Spirit of Texas" is helping you.

April 1927, to his condition after April, 1927. Mr. Bergholm's health previous to April 1927, was good. He was in a normal condition as far as any physical appearance or personal contact I had with him, could or did reveal. On and after April, 1927, his health was poor and when he came up here in July 1928. He had lung trouble and was reduced materially in weight. He coughed a lot and expecturated, which was very oderous. His right arm was practically useless. He had an incision in his back that was draining. I saw Mr. Bergholm on an average of twice a day from the time he came here in July, 1928, up to March, 1929, when he left for Wisconsin, and during all that time he was in a very bad physical condition. I saw him mornings, noons and nights, and always planned, and did see him, at least once a day, while I was in Munising, which was practically nine-tenths of the time. You see, Mr. Bergholm was an invalid and I felt that became of old friendship, responsible to do everything I could for him. I have hired hundreds of men, both for factory and office work. I had two positions for him but he was unable to take either one of them. He was a mere shadow of his old self. He was weak and could hardly walk. He walked all bent over and shuffled along the street when out for exercise. Our factory is located three blocks from the hotel he stayed at a part of the time and about once or twice a week he would take a little exercise and walk down to see me during the warmer part of the day. He could hardly make it. His condition kept getting gradually worse. He
91 was weak, had no appetite, coughed almost continuously and for a considerable period of time he was in the Munising Hospital and was under the care of Dr. R. A. Tearnan of Munising, Michigan, from the time he came up to the time he left. His condition was very poor, he being hardly able to stand on his feet for a good deal of the time. He

was sick in bed. When he took a little exercise he was always bundled up. He seemed to be cold, with little energy and always appeared to be in pain. This pain could be noticed when he attempted to move by his facial expression. His condition gradually grew worse. It was bad enough when he came up here to render him unfit for work. I did not see him after he left Munising in March, 1929, which, as I remember it, was just about a month before he died. I base my answer on the fact that I have hired hundreds of men to work during the past fifteen years, and know from experience when a man is able to work. His general physical weakness prevented him from even travel to work. There was no work for him to do. He could not even do the lightest form of work. I had two light jobs for him, made especially, but he could not do either. He was willing to work but just did not have the physical energy, and that, coupled with the continuous pain he manifested, completely incapacitated him. From April, 1927 to July, 1928 I have no personal knowledge of Mr. Bergholm's capacity to work. Several months previous to July, 1928, I would say from observation, that his ailment had been running sometime previous to July, 1928, for the reason that his condition was gradually progressively worse, and his general appearance when he came up here, would indicate that the ailment he had been suffering from had been with him for sometime. I can, however, positively state that from the time he came up here in July, 1928 to the time he left in March, 1929, he was totally incapacitated.

92 Mr. Bergholm performed no useful employment whatever from or about July 15th, 1928, up to the time he left here in March, 1929. I had two jobs open myself any time he could do them but he could not do it. The Alger County

We hope you are improving gradually. We are wondering if you will be able to send in a little business before the close of July. Perhaps Mrs. Bergholm could see some of your prospects there.

We have written you several times regarding the nets on the Ward policies. Please take care of them right away as the second premiums are now settled for. Also take care of the other past due nets. We want to get these all settled before the close of the present club year. Your check should be received here before July 26.

Yours very truly,

THOMAS A. STAMP,
State Manager.

TAS:EO.

22. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, July 26, 1927.

Mr. C. O. Bergholm,
604 Fresno, Plainview, Texas.

My Dear Mr. Bergholm:

We are glad to hear from you again, and hope that you will continue to show progress in your health. You have had a long siege of it, but we hope that you will soon be your usual self.

103 Of course, we do not want you to get out, if your doctors say it is best that you stay in. However we are in a rather embarrassing situation with reference to your nets. The Home Office is pressing us very hard to make collection, on these items. Would it be possible for Mrs. Bergholm to see Mr. Ward, and collect the amount that he owes. He has started paying on the second year, and we have not yet had a remittance for the net on the

first year. This is unusual and Mr. Ward should see that this cannot be permitted. The net, at least, with interest should be sent in right away.

We thank Mrs. Bergholm for the application sent in. The examination did not look first class, but we hope the policy will come through in good form.

The following nets are now past due and every effort should be made to get them sent in. We would appreciate it if Mrs. Bergholm could do something with regard to collecting on them, and sending the amounts to this office; with interest:

155108	O. A. Hooper	$22.21	Due March 15
	N. G. Moseley (Fee)	1.00	Due April 1
156624	R. M. Ritchie (bal)	8.78	Due April 16
157726	F. W. Lowe	8.30	Due May 7
157725	Clift Harris	12.62	Due May 7
157432	R. F. McLaughlin	8.35	Due Apr. 31

If you are not able to get these items taken care of, please forward the notes taken in settlement for the premiums, to this office, and we shall make an attempt to collect them from here. The Home Office insists that where the nets are past due, the notes be held in this office. Please let us hear from you right away.

104 Yours very truly,

THOMAS A. STAMP,

ERO. State Manager.

23. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, August 1, 1927.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

We are now beginning a new club year. Today is the first day. July 31, 1928, is the last day. We

want to hold up a goal for every full time man for this year in Texas, which is $200,000 of paid for business. This gives you a fine income. It is not too much to produce. $200,000 will mean $16,000 a month, practically, or $4,000 a week. Why not set this as your ideal for this club year?

We want to make this one of the best years you have ever seen. No doubt you will be feeling better before very long. Do you think it would be possible for you and Mrs. Bergholm to write $100,000 next year, beginning today. This will mean $8,000 a month. I believe you can do it. The county that you are living in is one of the best in West Texas. When you are able to get about again, this should be possible. This work is about the best work for you to engage in if you are not feeling very strong. Hope you are feeling much better now.

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:EO.

It is my ambition to write $100,000 of paid-for business during the 1927-8 club year.
Signed .....

105 24. The plaintiffs introduced the following from a letter written by Thomas A. Stamp, State Manager, of Peoria Life Insurance Company, to Mr. C. O. Bergholm, Plainview, Texas, August 8, 1927:

What are your plans for this club year? We have not heard from you about the notes. We wish you would make collection or send the notes here, that we might make an effort at this end. We think perhaps you had better send the notes in. We might be able

to get some money, and save some for you. We hope so at any rate. We want to have the slate clean. The nets have been delayed too long already. The company is insistent on payment and we hardly know what to write them. If we had the paper in this office it may help to satisfy them.

We hope you are feeling much better and are able to do a little work now.

25. The plaintiffs introduced in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, August 12, 1927.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

We have written you twice about sending the notes you have, to this office. You realize that the nets on this business are long past due. On some of the business the second premium has been paid, and the net due the company is still unpaid.

Please send the notes to this office and we shall write the policyholders and see if collection can be made from this office. We are going to write
106 to each of the policyholders, whose net has not been paid, and attempt to make collection direct, in a few days. We shall notify you of any amounts collected, and give your account credit. Kindly let us hear from you at once.

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:EO.

26. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, September 13, 1927.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

In Re: Etta May Windwehen #163404.

The above policy was mailed to you on August 4, and the time allowed for delivery has expired. We therefore take it for granted that you have delivered this policy and ask that you send in your net, amounting to $33.00. Mrs. Windwehen's note is being held in this office. However, the note is for only $40.73 and the premium on the policy is $60.00.

We are enforcing the rule that all nets must be paid within thirty days, and must ask that you send us $33.00 to cover this net now, as it was due on September 4. The Home Office will not permit us to get behind on any more nets. Please let us hear from you at once. We would also appreciate a remittance to take care of the other nets which are now considerably past due.

Your co-operation will be appreciated.

Yours very truly,

ERO. EARL R. OTTA, Cashier.

107 27. The plaintiffs introduced in evidence the following from a letter on the letter-head of Peoria Life Insurance, from Thomas A. Stamp to C. O. Bergholm, dated Dallas, Texas, September 14, 1927:

I expected that you would be able to send in some business Oscar, with the help of your new man Kennedy. Have you worked with him. What are the prospects for business in that quarter? Here is a secret. There is usually a slump after the trip throughout the territory. I would like to make Texas an exception in this matter. Won't you get your lines

out and send in a fine business before the first of October. I believe you and Mr. Kennedy could do this.

Mr. May was asking me about your nets and about the notes. He seems very much disturbed about these nets. He says they should be paid at once. I had a hard time explaining the matter. I trust that you will comply with our numerous requests with regard to sending these nets or the notes. You understand this is a serious matter, and we would like to have it straightened up. Please do something about it.

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:EO.

28. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, September 19, 1927.

Mrs. C. O. Bergholm,
Plainview, Texas.

My Dear Mrs. Bergholm:

We have written Oscar a number of times regarding the balance due on his nets. We have made
108 a request that he must either send check to cover the nets or send the notes which he is holding. I had a talk with Mr. May and he is insistent that Oscar do one thing or the other, either send the money for the nets or the notes.

We were very much surprised as was Mr. May, that Oscar should take the nets and use the money for personal expenses. As you know, this is not the right way to do. In fact it is just the wrong way to do.

We are writing you because Oscar does not answer our letters and does not comply with our request.

We are asking you Mrs. Bergholm, to see that the check for these nets is sent to us by early mail, or that the notes be sent to us. Of course sending the notes would not relieve him of the liability for the nets, as these must be paid in cash, but we may be able to get some cash on the notes. We can not delay the matter longer. Mr. May is insistent. Please make some plan by which the matter can be settled.

Oscar sent us the Lowe note, and said that Mr. Lowe would write us, but we have never heard from him. What shall we do about this note? Please write us fully about the whole matter. We have been very patient and I would like to go on being patient but Mr. May has insisted that we get the matter settled at once, and I am under his orders and must comply with his requests. The rule is that all nets must be paid in cash, in thirty days, and we have been very liberal in this matter, but must now insist that they be paid, as the time is long past, and 6% interest must be added.

Awaiting your early reply, I am,
Yours very truly,
THOMAS A. STAMP,
State Manager.

109 29. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas. September 30, 1927.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

October is Manager's Month. This is one of the special features of the Peoria Life Organization.

During this month every application is written in honor of the State Manager. I have been appointed to act as Manager for October to give Mr. Stamp the honor of all the business that is produced. He will spend most of his time doing organization work. We want to increase the volume of business materially during October as a special tribute to him for the help and service that he has been giving as Manager.

I sincerely hope that you are again feeling better and that you will be able to get a fine volume of business during October. Tell Mr. Kennedy about Manager's Month and work with him. I know that Mr. Stamp would be very much pleased to see a fine volume come from you and Mr. Kennedy during October. We want to ask that you and Mr. Kennedy write $15000 in October. The two of you should be able to do this. This would be a fine compliment to your manager, and it would be also a favor to me as manager for the month. I am anxious to see you send in a fine volume partly because we want a good production and largely because I want to see you make the money.

Please write me just what you think you will be able to do this month. Just start out the first of October and keep the matter in your mind constantly.

If Mrs. Bergholm is able to send in a few
110 applications I know that Mr. Stamp would appreciate this tribute to him. You have always shown your loyalty during these special months and we want to count on you for at least $15,000 for October.

Yours very truly,
EARL R. OTTA,

ERO Acting Manager.

30. The plaintiff next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas. October 5, 1927.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

We have received the checks you sent in and want to thank you very much for taking care of this business as you have. Enclosed you will find statement showing the credits to your account. Also Miss Sanderson's receipt.

I note that you say you are going to send in some new business from Plainview during Managers Month. This is certainly fine and I hope that you are very successful in closing a fine volume. I know that you need the money and will do your best to close the business. We are very glad to hear that you are beginning to feel like yourself again. This is encouraging and you will now feel like going out after the business. Of course you will have to take care of yourself for some time to come.

We are glad that Mrs. Windwehen is going to take care of her note and shall look for another payment to apply on her net within a short while.

Please see Mrs. Lynn at 727 Baltimore,
111 and collect Mary D. Lynn's $15.32 semi-annual premium. This was due on July 30 and we have not received settlement. It will be necessary to take a health certificate.

Trusting that October will be a good month for you, we are,

Yours very truly,
EARL R. OTTA,
ERO Acting Manager.

31. Plaintiff next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas. October 26, 1927.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

Manager's Month is almost gone and we have not had the pleasure of receiving any applications from you. We know that you have a high regard for your Manager, and would appreciate it if you would show your loyalty for him by sending in a few thousands of insurance. Every application that is received is appreciated by Mr. Stamp.

You perhaps are wondering how we are getting along in our goal for $120,000. To date we have received $116,000. Would it be possible for you to send in $4000 before the 31st which would make us reach our goal. Then the business received from the territory will all be "velvet" and a sort of extra or double tribute to Mr. Stamp.

Be sure to mail your applications not later than October 31. We want every agent to write at least one application during Manager's Month.
112 It would be fine if we could make it 100%. Send in yours and take an active part in the wonderful tribute we are showing for our Manager. I shall look forward to receiving some nice business from you within a few days.

Yours very truly,
EARL R. OTTA,
ERO Acting Manager.

32. The plaintiffs next introduced in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas. December 6, 1927.

Mrs. C. O. Bergholm,
Plainview, Texas.

My Dear Mrs. Bergholm:

The Home Office has written us repeatedly about Oscar's account. We are taking the matter up with you hoping that you will give us a reply. The company is insistent on you sending us a check to take care of the nets due on the business which has been written and which is long past due. This is the only way we can do. We regret that we must be insistent at this time but the books of the Company are closing and they must have all the nets in by the 25th. It is not what I want but the Company insists so I am asking you Mrs. Bergholm to send us your check to take care of this balance. The Company says it must be paid. Please give us an early reply enclosing your check.

We are enclosing herewith a renewal check. We have sent several of these to Oscar during the past few mouths, and asked him to indorse them and return them to this office, to be credited to his account.

113 This he has not done. We also asked that he sign the attached blue voucher and return to this office but have not had them returned.

In our letter of November 23 to Oscar, we informed him that the balance due on his account was $81.61, with interest. We find that $5.50 was sent in with the Windwehen application, which leaves a balance due of $76.11 with interest. Please let us have a remittance for $78.50 which will take care of the nets and interest.

We shall look for a reply by return mail.

Yours very truly,

THOMAS A. STAMP,
State Manager.

TAS:EO.

could not send you any this year. We shall try and send some a little later from this office.

We hope that you will be able to get some business now that the year is starting. Are you planing to round up a good volume for the Pig Contest? Have you given up life underwriting? If the contract continues in force the Company says that it will be necessary for you to produce some business. They want to keep the records alive. Let us know by early mail just what your plans are with regard to Peoria Life. Do you want to continue your contract in force. As you know you have a 75% contract and this is given only to our District Managers. We have one man producing $200,000 who is under a 65% contract. We shall try and hold your contract to this figure a little while longer providing you can send us in some business before a great while. Otherwise we shall have to change it a little later.

Let us hear from you about the nets due
115 and also what you want to do with regard to your contract.

With best wishes for the New Year for you and the little famiy, I am,

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:EO.

34. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas. January 11, 1928.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

You have certainly disappointed us in not sending in settlement for the amount due on your net account.

We are very anxious to get this item taken care of since the Home Office is pushing us very hard for it. Is there not some way by which you can raise the money to send us. We are trying to collect on the Windewehen, Lowe and McLaughlin notes but have not had any success. Please see them and urge them to make payment.

You realize that you are responsible for the nets on all of the business you have written. We understand from you that you have collected some of this money and used it for your personal needs. This must be paid to us at once. We cannot understand how you expect us to explain this to Mr. May, since he is pushing us so hard for collection. Your account is in a very bad shape at this time, and will have to be taken care of promptly. Won't you make a strong effort to take care of it? Surely you could send us a substantial payment now. We have been very patient, but there is a limit to the time we can allow you.

We have not heard from you for a long
116 time and would appreciate it if you would write us a letter and tell us just when we can expect settlement in full.

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:EO

35. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas. March 15, 1928.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

We are sorry you were unable to deliver the Nelson Policy and hope you will have better luck next time.

We are sorry to know that you are still ill. You have had a hard time Oscar, and we hope that better days are just ahead. We hope the x-ray will show your lungs to be in much better condition.

If it is possible for you to qualify for the convention we should be glad to have you with us. The change will do you a lot of good.

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:EO

36. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, March 26, 1928.

117 Mrs. C. O. Bergholm,
Plainview, Texas.

My Dear Mrs. Bergholm:

We are sorry to hear that Oscar is confined to his bed and sincerely hope that he will get along nicely and the rest will bring him new strength. We hope for his speedy recovery. We want you to know that you have our sympathy and our very best wishes. Tell him he must not get discouraged. This is the time when he must grit his teeth, and hang on like a beaver. He has a good little wife in you. You are brave and doing all you can to help him. We know he appreciates this. We hope you will have better news for us in the next letter. We are going to miss you at the convention. We had such a good time with you last year. We hope that next year you will be with us and that the sky will soon be brighter.

In regard to the collections, I would do my best to make them. See the different ones again, as you have opportunity and then write us in detail just what

the situation is. You might just go and press the matter up to them. I believe with your personality you will be able to get some of the money. Just do your best and then let us hear from you.

Mr. Harris has not written to this office. Do you have his note there? You might try to find out how he addresed the letter, for we did not receive any from him.

We appreciate your letter of explanation. We want to give you time for the collection of the money and hope you will be able to get it all. Will it be possible for you to get someone to help you collect this money from Lowe? Has he any property. Would it pay us to force collection?

Again we want to express our regrets at
118 the condition of Oscar's health and extend our best wishes for his speedy recovery.

Yours respectfully,
THOMAS A. STAMP,
State Manager.

TAS:EO

37. The plaintiff next offered in evidence the following Western Union Telegram:

Dallas, Texas. 11 53 A APR 5 1928
C. O. Bergholm
Plainview Tex
We missed you at convention yesterday best wishes for speedy recovery

BERT MOORE
ORILLE R EBY
Committee 12 32 P

38. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas. June 20, 1928.

Mrs. Iris Bergholm,
Plainview, Texas.
My Dear Mrs. Bergholm:

We are writing Oscar today regarding his account. The amount due on May 31 was $56.43 with interest to be added. Now we have been very patient and have waited for this money, but some of it is now a year and more past due. There is nothing else to do but to pay it now. Won't you please make arrangements some way to send us your remittance to cover this amount. We know that you do not want us to get into difficulty with Mr. May on account of Oscar's balance, but he is not getting after us strong, and we in turn must insist upon an immediate settle-
119 ment. Please let us know how you will be able to handle this account.

We trust that Oscar's health is improving and that he is well on the road to recovery. We have not heard from either of you for some time, and shall be glad to have a letter by early mail.

Don't fail to make some arrangement to take care of the balance of $56.43. This is necessary now.

Yours very truly,
THOMAS A. STAMP,
State Manager.

TAS:EO

P. S. See Mrs. Windwehen and get the balance from her.

39. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas. June 20, 1928.

Mr. C. O. Bergholm,
Plainview, Texas.
My Dear Mr. Bergholm:

We are writng you with regard to the balance due on your account. We are enclosing a statement

showing the various items due on May 31, amounting to $56.43. We will have to insist upon a remittance from you at once to be credited to this account.

You know that you are responsible for the nets on the business written by you, and the most of these items are a year old. Mr. May is writing us some pretty strong letters and we feel that we have been patient with you, but the time has now come when it will be necessary for you to settle this account. Surely you do not expect us to wait longer, because these nets are now long past due.

Will you please make some arrangement whereby you can send us your remittance at once to
120 clear up this old balance. This is necessary now and we hope you will do it within a very short time.

We trust that your health is improving and that you will soon be your usual self again.

Yours very truly,

THOMAS A. STAMP,

TAS:EO State Manager.

40. The plaintiffs next offered in evidence the following portion of a letter written by Thomas A. Stamp to Mrs. C. O. Bergholm, dated August 9, 1928, Dallas, Texas:

We thank you for your check in the amount of $9.00 to apply on Mrs. Windwehen's note.

If you sell $100,000 you will make more than you will teaching. This will give you a trip, and also the renewals. I wish you would give this very serious consideration because you have a sales personality. You impress people and have a good mind. You impress the people to whom you talk, and present the insurance idea in a very clear way. I am not going to urge you along this line, but I do feel that you can sell life insurance. I enjoyed my work with you and

feel that you have done well with the conditions you had to work with. When I come back from the trip if you decide to take up life insurance I will give you some help. You can take the revised sales course which is just completed. Everything is brought up to date. I will favor you a little. We will give you the same contract Oscar had, which is unusual, 75% with renewals.

Think this over and write me soon after you receive this letter. We certainly sympathize with you in your battle that you are fighting. We hope Oscar will continue to improve. We are glad the condition is not as serious as thought at first. We want you
121 to know that Mr. Otta and I have thought of you a great deal, and if you take up life insurance work we will give you our best service and cooperation.

41. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas. September 29, 1927.

Mr. C. O. Bergholm,
Plainview, Texas.
My Dear Mr. Bergholm:

In your last letter you stated that you were enclosing the Roy McLaughlin note, but failed to do so, This was perhaps an oversight. You also stated that Mr. Ward paid you $15.00 but did not enclose your check for this amount. Please send this in right away. We note that Mr. Harris expects to pay you in a few days. Keep after him, as we must have your balance cleaned up as quickly as possible. You also stated that you were sending check on Nancy Sanderson's policy, but we did not find it.

If it is impossible for you to take care of your next quarterly premium, please send us your check for 10%

of the annual and also the enclosed renewal note for the balance. Since your grace period has expired, if you have not already sent some kind of settlement the Home Office will not be able to accept it without a health certificate. We hope that you have sent in a settlement of some kind. Idelle's premium is also past due.

Mr. May has advised us that he will be in the Dallas Office in a couple of weeks, and we are very anxious that you get your account all straightened out before he gets here. I think he will be here about the 15th or 20th. Please do all in your
122 power to get your account taken care of as he is quite insistent and will perhaps be disturbed if it is not settled by the time he gets here.

Yours very truly,

ERO EARL R. OTTA, Cashier.

42. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Peoria, Ill. October 17, 1927.

Mr. Carl O. Bergholm,
Plainview, Texas.

Dear Mr. Bergholm:

Your policy lapsed a week or two ago, and the cards have just come to my department. However, I can find no record of any reason why your policy has been lapsed, and of course, I can not complete my records without this necessary information. Will you kindly use the enclosed form, telling us why your premium was not paid?

A reply by return mail will be appreciated.

Yours very truly,

J. B. WILLIAMS,
Statistician.

THY:EMS

43. The plaintiff introduced in evidence the following letter on the letter-head of the Peoria Life Insurance Company.

Peoria, Ill. November 10, 1927.

Mr. Carl O. Bergholm,
Plainview, Texas.
My Dear Mr. Bergholm:

123 In re Policy #140964.

Will you kindly permit this letter to offer you a means of continuing your Insurance Estate of $5,000.00?

You are certainly fortunate in possessing your Special T. A. O. Policy as it is only issued to a select class of risks, Mr. Bergholm, and cannot be replaced for the premium you are now paying.

Your policy is a family treasure and therefore your most sacred possession. It means a great deal to your loved ones as no doubt a check for its proceeds would prove a Godsend to them in case the unexpected should happen.

Do not forget that in addition to protecting your family, you are providing an income to yourself in case you become dis-abled and cannot work. You are also creating a Savings Fund to help you during future emergencies. Your policy has therefore become very valuable to you.

Now, Mr. Bergholm, we can help save your $5,000.00 Estate by granting you a small loan of $102.18 to take care of your August 1927 semi-annual premium of $99.15, premium interest $1.09, as well as loan interest to February 27, 1928 of $1.94 and thus place your policy in full force to February 27, 1928. Simply complete the enclosed loan agreement and Health Certificate before a Notary Public and re-

turn these forms to us with your policy. We will then be glad to complete the loan and will send you the proper receipts.

We will be especially interested in your early reply and have enclosed an addressed envelope for your convenience.

Most earnestly yours,
L. J. MENEREY,
Manager Service Dept.

LJM:V

124 44. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Peoria, Ill. November 26, 1927.

Mr. Carl O. Bergholm,
Plainview, Texas.
My Dear Mr. Bergholm:

In re Policy #140964.

Although you have failed to reply to our letters, we are still ready and willing to serve you in every way we can. You have been very thoughtful in creating this fine $5,000.00 Insurance Estate for Mrs. Bergholm and we desire to help you in order that she may have the protection your Peoria Life Policy affords her.

Since we wrote you on November 10, we have thought a great deal about your case, Mr. Bergholm, and have concluded that the logical thing for you to do is to take advantage of the "Automatic Premium Loan Privilege" as provided on page three of your policy.

If you will simply sign the enclosed form and return it to us with the Health Certificate properly completed, we will complete a small loan to renew your policy to February 27, 1928 and will furnish

33. The plaintiffs offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas, January 3, 1928.

Mr. C. O. Bergholm,
Plainview, Texas.

My Dear Mr. Bergholm:

We acknowledge receipt of the checks to cover the quarterly premiums of Mr. Cantrell and Mr. Covington.

In regard to your account, as you know the Company holds you responsible for the nets. It is not a question of whether you can get anything from these men. The only thing we can do is to look to you for the money. We do not take the responsibility as you know, on notes. This is your matter entirely. We regret that the matter is being delayed so long. The Company is writing us and insisting on settlement. We have written you a number of times about this matter. Is there not some way in which you can get sufficient money to take care of the
114 balance due on your nets. It is very poor business to have this matter of settlement drag on so long. I shall have to make another personal report to Mr. May when I go to Peoria to the Manager's Conference next week. He surely does come back mighty hard. I do not know what to tell him. I wish you would send me a check for as large an amount as possible and mail it to me at Peoria so I will get it the first of next week.

When you write more business I would not write it unless I got the nets with the application. We require that all nets be paid in 30 days. The business must be settled for absolutely in this time. Any other way makes worry and trouble all along the line.

In regards to the calendars the Company thought that since you had not written $100,000 that they

you the proper receipts together with a statement showing just what the loan covers. It will not be necessary for you to send in your policy or even appear before a Notary Public.

We are enclosing an addressed envelope for your convenience and suggest that you sign the blank now and return these papers to us so that we may act promptly in your behalf.

Most earnestly yours,
L. J. MENEREY,
Manager Service Dept.

LJM:V

125 45. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas. April 9, 1928.

Mrs. C. O. Bergholm,
Plainview, Texas.

My Dear Mrs. Bergholm:

We received your letter written April 5, regarding disability claim for Oscar. We took this matter up with the Home Office as soon as you wrote us that Oscar perhaps had t. b. We wanted to do everything in our power to get the claim for you because we felt that you needed it. We thought perhaps it would be doubtful but we wanted to make certain and wanted to do everything in our power to secure the claim for you if it was at all possible.

The Home Office has written us that the claim could not be allowed as the policy is not now in force. The policy provides as follows:

"To entitle the insured to Disability Benefits, this policy at the time of making claim must be in full force, and all premiums due prior to the time of making claim must have been duly paid by the insured."

quarters of the second year. The extended insurance begins when the full second annual premium has been paid.

We tried to get Oscar to keep this policy in force. We tried to arrange some kind of a loan and were anxious to have him keep it in force. We did everything in our power. I think you understand that it is just impossible for us to do anything about it. The policy was lapsed for non-payment of the August 1927 premium. Your letter was written April 5, 1928

asking us if we could do something about his
127 policy. As we have just said, we regret this very much. It proves again how important it is for one to keep up their insurance premiums.

Most companies do not give any extended insurance until the third premium is paid, but the Peoria Life gives consideration after the second year is paid.

We acknowledge the check for 37¢. There are two others that were sent to him, one for $3.31 and one more for 37¢. I presume you could find them among his papers. This was a renewal commission which was sent to Oscar. We asked him to indorse the checks, and return them to us, so we could credit his account.

There is a small balance of $8.64 still due on Oscar's account. We have been cutting it down by applying the renewals against it, but they are coming in very slow. We tried to collect the F. W. Lowe and Etta May Windwehen notes, but have been unsuccessful. We return them herewith. It may be that you can collect them now. The Harris note should be collected. We sent the policy to Oscar and he no doubt delivered it to Mr. Harris. The policy was never returned, and consequently Mr. Harris was protected under it for a year, whether it was in his possession or not. We would suggest that you put these notes in the hands of a good collector and let him go after the money. You can then send the small balance of $8.64 and keep the rest. This is

your money. We hope you can get it. We appreciate the fact that you need it, as you say. You ask if there is any way to prove that Harris had the policy. His insurance was in force, whether he had the policy or not. We sent it to Oscar, and the net was charged to Oscar, and consequently considered as paid, and the insurance was in force. I would go after this money and get it. Get some good man to help you.

128

In regard to Adele's insurance only one quarterly premium of $7.67 was paid on the second year, and consequently this is also lapsed.

In regard to your taking the agency, we have a man who is taking over the Amarillo agency. We could give you a contract on the 70% graded basis without renewals, or 65% with renewals. If this would be satisfactory we should be glad to make out the contracts and send them to you. We believe you could write some business there. You have a fine personality. You have a good approach, and the confidence you have there should make it possible for you to write a nice business. If you would like to have me come up to see you in June, I can make arrangements to do so. We should be glad to help you. The man who is taking over that territory is a principal of one of the schools in Amarillo. He could run over and give you some help from time to time if you would care for it.

We shall be glad to hear from you again.

Again expressing our sympathy for you, and with all good wishes,

Yours respectfully,
THOMAS A. STAMP,
State Manager.

TAS:EO

47. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Peoria, Ill. July 9, 1929.

Mrs. C. O. Bergholm,
129 2202 17th St.,
Lubbock, Texas.

My Dear Mrs. Bergholm:

In re policy #140964—Carl O. Bergholm.

Answering your favor of the 3rd inst. I am very sorry indeed that Mr. Bergholm did not keep up the payments on his policy but when you realize that this policy was issued in February 1926 and the premium paid for that year, and then only two quarterly premiums paid in 1927, and after that time has elapsed without any action, you can see that it makes a very bad situation.

Yon can see from the policy just what the provisions are and the Company would not be allowed to pay a claim that was not within the terms, and I am sure you would not, in fairiess, ask us to do so. All the information we have received fails to come within the terms of the policy. I am very sorry.

Very truly yours,
EMMET C. MAY,
ECM. W President.

48. The plaintiff next offered in evidence the testimony of GUY HERRING, who testified in Court in behalf of the plaintiff:

I live at Lubbock, and have lived here two years this coming September. Mrs. Bergholm is my wife's niece. I first became acquainted with Mr. Berg-

holm in September, 1924, in Mexia, Texas. He came to Mexia at that time to make his home. He and Mrs. Bergholm lived there until the following September, 1925, and went from there to Plainview. I was with him practically every day while he was in Mexia, about a year. I saw him in Plainview in August, 1927. I was there visiting Mr. and Mrs. Bergholm's mother for about three weeks. I was with him practically every day for three weeks
130 that I was there. My acquaintance with him prior to that time was such that I was able to form an opinion as to whether or not up to the time he became sick he was strong or able-bodied man, and my opinion was that he was a healthy, hardy and strong man. After I went to Plainview and saw him in August, 1927, I observed that he was not the man that he was in September, 1924 or in 1925. When I saw him in August, 1927, I would call him practically an invalid. He was almost helpless, could hardly walk around, barely could walk around a little and he would become exhausted. He just did not have any breath it seemed like. He was not doing anything at all. I carried him to town nearly every day in a car. I don't think he could walk to town by himself at all. For three years before he went to Plainview, I was intimately associated with him almost daily. I was associated with him in a business way and in trying to held him secure applications for insurance. For part of the time he lived in the house with me, and he was then in the insurance business, engaged in the insurance business, which was the only business he had and he was active in that business, and in my opinion his mind at that time was sound and normal, and I noticed nothing during that period of time that indicated anything in the way of impairment or derangement. When I saw him in Plainview in August, 1927, he had an idea in his mind when I was there that he was going to open up a great mercantile es-

tablishment. That seemed to be his hobby and he discussed that at length with me. He said he was going to open up this business in the near future and told me what all he intended to do; that he intended to make a great success of it. He seemed to have a plan on which he was going to run it and operate this business. He did not have anything so far as I knew in the way of finances. During that time he hung round a little sporting goods store of
131 Mr. Brown's. I was in that place with him quite often while I was there and I met Mr. W. A. Brown of Plainview. Mr. Bergholm always suggested that we go around and see Mr. Brown when we were in town; go around and call on him. Based on what I saw and the observations I made of Mr. Bergholm's mental condition when I was in Plainview in August, in my opinion his mind was impaired to such a degree that his efficiency in the handling of details was decreased, retarded, and he was not competent to efficiently handle details. Based on my acquaintance and observation after I visited him at Plainview in August, 1927, he was very pessimistic and his mind was depressed. He told me he would rather be dead than living; that he was worth nothing to his family in the condition he was in; that he felt he was a liability to them in the place of an asset. Mrs. Bergholm was then teaching school. Every time Mr. Bergholm would move it seemed like it was very painful. It seemed to be in his shoulders and chest and back. Every time he went to move you could see an expression of agony on his face. The color had gone from his face. He was very pale and white. He did not have a red robust complexion that he had had. At the time I visited him in Plainview he did not seem to have any business ideas. All of his ideas seemed to be more or less impractical. He was more of a retiring disposition when I saw him at

Plainview, and did not seem to enjoy being in company, didn't seem to enjoy carrying on a conversation as he formerly did. Based on all that I saw and witnessed while in Plainview in 1927, I would say his mind was unsound.

On Cross Examination.

Mr. Herring further testified:

From about 1920 to 1926 I was in the insurance business in Mexia. I quit that and went into the oil business some time in 1926 and moved to Lubbock in September, 1928. I did not say I was with Bergholm everywhere when I was visiting him in
132 Plainview, in August, 1927. I took him about quite often. He could kinda drag around. He did go about town. I didn't see anything of his being in charge of Mr. Brown's store. I don't have any recollection of his having transacted some insurance business with a man named Lowe during that time. If he did any business I don't know anything about it. Of course, I don't know everything that he did. I was not with him all of the time. I saw him every day and was with him some a part of each day. If he did any business with a man by the name of Richie and wrote the company about it, I don't know anything about it. I don't know anything about his going to see a man by the name of Ward in August, 1927. Mr. Bergholm and his wife were not living with her mother at that time. I don't remember where they were living. I did not happen to be with him or see him or see anything about his collecting any annual premiums from a man named Powers at that time. I would not tell the jury he was not able to write and sign a check for it if he collected it. He was not paralyzed and was not in bed.

49. The plaintiff MRS. IRIS CHRISTINE BERGHOLM next testified on direct examination in behalf of the plaintiffs, as follows:

Carl Oscar Bergholm was my husband. We were married in 1921. I met him while he was at A. & M. College. I was in college at Huntsville, Texas, and I met him with some A. & M. students with some students from our college when we were together. He was of Swedish descent and was born in Finland. He came from Michigan. While he was in A. & M.
133 he was a student there studing Radio Electrical work and that was his assignment in the army. He died April 18, 1929, at Painview, Texas. He had been in the United States Army and got out when the Armistice was signed. At that time as far as I know he did not have any apparent disease or illness that I knew at that time. I saw him soon after the Armistice was signed for the last time until he came back something like a year before we were married. We were married in Hermleigh, Texas. We moved to Plainview in September, 1925. We have one daughter, Adele, who is eight years old. In Mexia Mr. Bergholm was in the insurance business representing the Peoria Life Insurance Company and was engaged in the same business after he went to Plainview as District Agent, District Manager under State Agent, Thomas A. Stamp of Dallas. Up until the spring or summer of 1927 Mr. Bergholm's health was all right. The first that I ever realized that he had any trouble at all—I do not mean that he was never ill in his life, maybe he had days when he didn't feel quite right, but he had never had a physician to attend him during our married life that I can recall up until the spring of 1927. He came home one day and I could see that he was not feeling well, and he says, "I have a terrible pain in my side, and I have been to Dr. Nichols' office and he believed

that I am going to have pleurisy. He has taped up my side." That is the first time he had any indication of this pain, if he had he had kept it to himself, until he came home suffering. He went for a number of days with this pain, and eventually went to bed, because he was not able to go. When he did not get any better I called a doctor, called Dr. Nichols, and told him he was not improving, and Dr. Nichols says, "You know we do not make calls from the hospital," and told me if he was able to come to bring him up, and I told him I did not think he was able because of the intense suffering, and he suggested
134 that I get another physician, so I got D. P. Jones and he waited on him for quite a while, and I called him and he came to see him, and Mr. Bergholm did not show any improvement, so I became discouraged, thinking that maybe so another physician could do something for him, and I called another doctor, Dr. McClendon, and he doctored him for some time and waited on him carefully. He insisted and instructed that I do certain things, and that I follow his orders, and I did follow them to the letter, at least tried to, such as taking his pulse every few hours and also taking his temperature and keeping a record of that and showing these records to Dr. McClendon. He continued to come to see him until he said, "Mrs. Bergholm, I cannot do anything else for him; it may be that they could do something for him in the hospital." Again I called Dr. Nichols and told him what Dr. McClendon had said, or went to see him, and he said, "Bring him to the hospital and we will make an x-ray picture of the lungs," and they did that, and if you are familiar with x-ray pictures of the lungs, you understand something about this picture. They did not know, but inasmuch as he did have lung trouble, they started out in the beginning to find tuberculosis, and they examined his sputum and they did not find any tubersular germs there, so

they thought that it might be that it would show up in the picture. The picture did not show tuberculosis, but showed a streak that indicated that it was pleurisy, but they said they could not operate for pleurisy until it localized, and the pictures they took never showed any localization, so they did not operate. I do not know whether it had localized or scattered or not, that was some of the beliefs. I am inclined to think that it may have and that his strong physical condition made it possible for him to overcome right at that time these conditions, because he did have a wonderful vitality, and I think
135 that was the thing that kept him from absolutely having to have an operation then, or else dying, as a result of not having an operation.

He continued in this condition, not capable of working, from that time until his death. During that summer he did a great many times get out and walk around; he knew that by exercise and sunlight he might be able to regain his strength. He slept out doors a great deal of the time, not at night, but in the daytime, and he really tried to be active, and I could tell though that sometimes—sometimes I thought at least I would be encouraged thinking he would get better, and may have felt at times that he was capable of doing something, however, I can look back now and know that he was not, because all of this time he was coughing and I was afraid that he might be taking tuberculosis, and I took every precaution that I knew how to take in case he did develop it, because I wanted to protect myself and my little daughter. Up until the time he became ill, most of the time—he had a good disposition and was not fretful and was very kind to the little girl and me, but after he became ill at times I thought he was just irritable, and of course I can look back now and I know that it was his physical condition. I can remember one time in particular when I had been out

working and I had written an application—anyhow I had written this application and had taken this lady to the doctor for examination, I remember that it was a very warm afternoon, and I returned home rather exhausted after my day's work, and after taking her I had to wait for her to do some shopping, and I had to get supper that night, and he was helping me about doing some things, helping to put some things on the table. I felt so exhausted I laid down for a few minutes, and he said, "Come on and eat," and I said "I just really do not feel like it," and
136 that was the first I ever noticed him of being irritable or how irritable he was. I did not know whether it was irritability or what, he had never acted just as he did, he had always been kind, but I remember that he caught hold of my hand and insisted on me coming in a rather abrupt way, and I noticed there was something strange about him—I am not trying to leave the impression that he was not same or that he was insane, but he did not act or look quite right. All along he did not tend to business, he might talk about it, and as far as collecting things that had been sent to him, he may have occasionally seen somebody. In a good many cases, as the letter indicates, we did very little collecting; that was one of the troubles. He was not able during the summer to make a living, because of his physical condition. He was trying to hold things together until I would begin drawing my pay the next year out of the school. One of the draw-backs was as he owed the company money and they were after us continually to make these payments, and not only notes, but renewals, and I attempted to make these collections sometimes, and which I did, and Mr. Bergholm may have sent in some, but it was not enough, counting altogether. He did not do very much collecting himself and I did not do very much. I paid off some of these notes for Mr. Bergholm, took it out of the

We regret more than we can tell that these are the facts in the case, but we are powerless to do anything. You understand that a life insurance policy is a contract and if the terms of the contract are complied with the contract must be carried out, but otherwise the contract is void.

Only two quarterly premiums were paid on the second year of this policy and it has therefore expired.

Yours very truly,

126 THOMAS A. STAMP,

TAS:EO State Manager.

46. The plaintiffs next offered in evidence the following letter on the letter-head of the Peoria Life Insurance Company:

Dallas, Texas. May 13, 1929.

Mrs. C. O. Bergholm,
Plainview, Texas.

My Dear Mrs. Bergholm:

We were saddened to hear of Oscar's death. It has been a migthy hard ordeal for you. You have carried the load well. You have been very brave and deserve a lot of credit. We regret very much that Oscar did not keep up his insurance.

We have looked up the records very carefully and find that Oscar paid his first premium, or rather the net on it. The policy was taken out on February 27 1926. He paid two quarterly premiums only, on the second year, on March 28 and June 4, for $50.55 each. He made no payments on the last two quarterly premiums for 1927. The disability clause is not effective, only when the premiums are being paid. It does not carry itself on extended insurance as the face of the policy does, but there was no extended insurance on his policy because he paid only two

money I made as a teacher. It seems that the impression may have been left that he was not working all of this time. To my certain knowledge he sold one policy from the time he became ill in the spring of 1927 until he died. In April, 1929—that policy was sold a few days before he was operated on in I believe January or February, 1928. $1.50 was collected on the policy and the policy was not delivered, so that shows he was not working. I know positively that he did not have strength to do it. On
137 the other hand, he was not thinking about business affairs, his thoughts were turned in order, you might say, he was thinking about himself principally, because of his illness and incapacity. He hated to feel that he was dependent on me for every bill that was paid. We were living in a rented house and I found that it was not possible to live to ourselves, so we went back to my mother and then, of course, we were not having this additional expense to meet. I knew that it was particularly due to his physical condition, and I think I know that the physical condition kept him from thinking in the way that he should. He used to try to be diplomatic about his work, and he got so there was absolutely no system about it. He knew of people who wanted insurance. In going to Mr. Brown's store he had met a man that he knew wanted insurance for his little boy and his little girl, twins, and he had written that he was interested in it. He did not go to see him, but he would ask me to go; I remember other cases also where he knew they were interested and ordinarily he would have asked me to have gone with him, but he did not. He would ask me to go to some of these places to some of these people. Some of these people I had been to see, but my success during that time was very slight because of the things I had to deal with at home and these extra worries that I had, not only because of his illness, but other things that were

brought about. There came a time when Mr. Bergholm was certainly not himself at all. I could not understand it at the time, but I look back now and I know it was because of his intense suffering. I can remember one time while we were in a house to ourselves that our rent had been past due and we were pressed for the amount of this rent and I felt that I could in some way, maybe, pay that rent, but I did not know how I could pay the month's rent in
138 advance. We were asked to pay up the back rent and a month in advance or get out.

I kept the company informed about his illness largely through Thomas A. Stamp, State Manager. He knew all the way from the very beginning until along toward the end, when I did not feel that it was necessary to correspond with him any more, because we were not doing any business. He was informed about his condition. I asked him when it was near time to pay this last quarter premium, I had paid the one previously, I asked his advice about what to do and he answered that letter and told me—referring to—.

It was not until after his death that Mr. Stamp or anyone ever told me that I would have to make a claim for disability on forms furnished by the company. Neither Mr. Stamp or anyone else representing the insurance company had ever told me that the claim or notice would have to be sworn to. For the first several months Mr. Bergholm was in the hospital, I was the only one to take care of him during that time except occasionally some one else would come in. I had practically all of the care of him aside from trying to make a living in the summer time and teaching during the winter, of course. I taught while Mr. Bergholm was sick. I did practically all that was done in trying to look after collections of notes and renewals and keep up the business. I was interested to do all that I could to make collections in order to help Mr. Bergholm retain the District Agency at

Plainview. The main reason I wanted to do it because it was the right thing to do, we were being pressed to do it, and I felt if there was anything at all that I could get that off of my mind then that would be just that much relief. On the other hand,

139 I felt that inasmuch as we owed on the notes, that was something to stand in the way of our taking care of the interest and quarterly premiums. I paid the last premium. That is one thing that made it hard to pay the next because I paid the last after school was out in May. I tried to look after Adele myself. I took care of her. I did all of the house work, including the laundry, not only during the summer but school time. I cooked and prepared meals for Mr. Bergholm, took his temperature and such as that. It took all of my time that I had. I did not engage in any social affairs except church work and that was usually on Sunday, Sunday School. There were times that we had hopes that he might get better. He would act as though he felt better and would be optimistic and he would look forward to a time when he would get well, then he would become depressed, and he often said "What is the use," because he felt he was doing everything he could do to get well and would make no improvement. There would be times when his coughing would be so terrible, often times the discharge would contain blood. I would become very uneasy about him thinking he might be developing tuberculosis, but during all of this time the doctors were making examinations, microscopic examinations, etc., and I would helped up thinking maybe so it was something he would get over, that it might be just a bronchial trouble of the old pleurisy, but those were times when we would become the most pessimistic about it, and he would become discouraged, thinking himself that he was developing tuberculosis, and we had a mutual agreement, so his feelings would not be hurt, that all of his dishes were boiled

from the very beginning, we both felt that inasmuch as it had to do with the lungs, that although the doctors were not finding germs, that it might eventually show up, and that we would be safe. Up to the time he went away to Michigan and Wisconsin, the
140 doctors did not tell me that he had a permanent and incurable disease. We both had hopes that he would eventually recover. That was the reason he went north, the doctors told him he must make a change. After he came back from these northern states some time in March, 1929, he was at home just a month before he died. When he first came back he was in a terrible condition, as bad as he was when he went away, but he became decidedly worse just one week before his death. After he was out of the hospital I dressed his side twice a day very carefully, and it drained from the time he was operated on until his death with the exception of about three days when it closed and it was necessary to open it. In the beginning this incision carried a drainage tube, but after that it was not necessary. The odor was the most offensive that I have ever known anything about from the very beginning and the time when his side was open, all the time that I took care of him. Because of the place of the incision just below his shoulder blade, it made one arm practically helpless. The muscles, I think, were severed, and a great deal of the time he used a cane in walking.

In answer to request that I tell one or two instances so the jury may have an idea of his mental condition, one time I remember in particular he was in one of these despondent moods and began walking slower and talking to himself, which was unusual, and he kept this up and the things that he said frightened me. I did not like to be a coward, I suppose I was, because I did not know what might happen, and we were not at my mother's home at that time, and I

took my little girl, it was after night, it was not the thing for me to do, but I did not know what to do, and he was walking and talking, walking the floor, and I did not know what he might do, so I took her and we went down a back street as far as we could until we got on the street at my mother's home, and we spent the night there. I did not feel that
141 I was doing right, I felt that it was unjust to leave him in that condition, but I was afraid for a time to come when he would come after me; I did not want him, he was so worried and despondent about his condition, I did not know and do not know whether I am allowed to say his physical condition and financial condition, I could state that his financial condition perhaps that was the reason he was taking this attitude, I suppose, and I was afraid to go back the next morning without my father, so I took him back and we talked things over and I tried to encourage him to pull together again so that he would not be so despondent, I tried to let him know or believe that there would come a time when he would not have to suffer that way and when he would not have to be dependent on me, that was the thing that worried him; was because he had to depend on me.

I was alarmed regarding the fear of suicide because he talked about it. He had sold his pistol but he had some guns and I kept those guns hidden from him for his own safety, and it was well that I did because a few days before he died, he told me that one time if he had had a gun he would have killed himself, that he was glad that he did not. I never have been paid anything by the Insurance Company in this case.

On Cross Examination.

Mrs. Bergholm testified; that her husband had written the letters marked Defendant's Exhibits Nos.

1, 2, 3, 4, 5; that she wrote Defendant's Exhibit No. 6; that her husband wrote Defendant's Exhibits Nos. 9, 10, 11 and 12. She further testified:

I first applied for a position as teacher in the Plainview school in the spring of 1926 and began teaching in the fall of 1926, and taught during the sessions of 1926, 1927, and also during the sessions of 1927 and 1928.

142 50. The plaintiffs next offered in evidence the following letter:

September 4, 1929.

Peoria Life Insurance Co.,
Peoria, Ill.

Peoria Life Insurance Co.,
1510-11 Kirby Bldg.,
Dallas, Texas.

Bergholm vs. Peoria Life Insurance Co.

Gentlemen:

We are attorneys for the plaintiff in the above suit filed in the 99th District Court at Lubbock, Texas.

As attorneys for Mrs. Iris Christine Bergholm of Lubbock, Texas, formerly of Plainview, Texas, we hereby respectfully repeat her request, in the way of a more formal demand, that you pay to her the face of the policy and other benefits to which she is entitled by reason of your insurance contract No. 140,964, for $5,000.00 bearing date of March 13, 1926, issued on the life of Carl Oscar Bergholm and payable to his wife, Mrs. Iris Christine Bergholm as beneficiary.

As we understand from the information furnished us, Mr. Bergholm became totally and permanently disabled about the month of April, 1927, and his dis-

ability continued until the time of his death, April 18, 1929, during all of which time his policy was in full force and effect. According to letters received from you, Mr. Bergholm had paid up all quarterly insurance premiums to May 27, 1927, after adding the thirty days of grace allowed in the policy. Under the insurance contract we claim that you were obligated to pay, under such circumstances, all in-
143 surance premiums from the time of such disability, together with $50.00 per month during such period, in addition to the $5,000.00 on the death of the insured. We therefore ask that you pay Mrs. Bergholm the following sums of money we claim are due her from the facts as furnished us:

(1) $5,000.00, representing the face of the policy.

(2) $1,200.00, representing $50.00 per month for period of disability from April, 1927, to May, 1929.

(3) $800.00, representing interest at 6% on the above unpaid amounts from maturity thereof.

By way of explanation, we will say that we are sending this letter to you by registered mail so that there will be no question concerning the legality of the demand for payment under the statute.

We understand that you have repeatedly denied all liability and refused to recognize Mrs. Bergholm's right to any sum whatever under the policy.

We shall appreciate it, if you will acknowledge receipt of this letter.

Yours very truly,
BEAN & KLETT.

ELK/r Reg. Mail.

51. The plaintiffs next offered in evidence the indorsement on Plaintiffs' Amended Petition showing the date of filing which was June 17, 1930.

52. The plaintiffs next offered in evidence the testimony of MR. E. L. KLETT, attorney for the plaintiffs, who testified as follows:

144 I wish to say to the jury that several months ago, I do not remember just when, Mrs. Bergholm came to the office of Bean & Klett, where I work, and engaged our firm to represent her in the collection of this policy sued on; and we entered into an understanding with her about a fee, and as an attorney who had been practicing in Lubbock for more than 20 years, and who feels that he is familiar with reasonable charged for services in such cases, that a fee of $2,000.00 would be a reasonable fee; that we undertook to recover from the insurance company, and in that connection I want to state that our firm has handled several life insurance cases, and also other cases, on a contingent basis, and that an unusually large amount of work had to be done and was done by me in this case as an attorney, in the first place, I was met with the statement by the adverse parties that this suit would be stubbornly fought. And in the event the case was decided you would engage another lawyer to carry it to the Supreme Court of the United States, and I felt sure from the statement you made to me that if this suit was decided against the insurance company that there will still be lots more work to be done in other Courts, and having had experience in the United States Appellate Courts, I know that there is still lots more work that will have to be done. I also want to explain that as you have learned during the trial of the case, many long depositions with various questions asked, in order to obtain the facts—and they haven't all been introduced in this case—for instance, here is a deposition of Mr. Otta covering a great number of pages, Mr. Otta from the Dallas office.

Here are the pages and here are the questions, and I think there are some two or three other similar depositions of that size. I also had to do lots of work on the law of the case, because I found that this is an unusually hard case, and I felt it my duty, under the circumstances, not to overlook any matter
145 connected with the law or the evidence. That is all.

Plaintiff rested.

53. The defendant introduced in evidence the following testimony of EMMET C. MAY, from his deposition taken by the plaintiffs:

My name is Emmet C. May; age 54; residence, Peoria, Illinois. I was not personally acquainted with Mr. C. O. Bergholm but may have met him at some agency meeting. I am President of Peoria Life Insurance Company and was on or about March 27, 1926, and prior thereto and have been since that time. On and before February 27, 1926, my office was in Peoria, Illinois, and has been since that date. Since I have been working for this company I have been Vice President and President. My duties have been the general supervision of the affairs of the company. I have never received any written statements from Mr. Bergholm or Mrs. Bergholm concerning the health of Mr. Bergholm. My office was never furnished with written statements to the effect that Mr. Bergholm was unable to look after his insurance business on account of illness at any time until several months after his death. Neither I nor my office was ever furnished with written statements to the effect that Mr. Bergholm was in a disabled condition.

54. The defendant next introduced in evidence the following letters which had been previously identified by Mrs. Bergholm on cross-examination
146 as having been written by her husband and by herself:

(a) Peoria Life Insurance Company,
Home Office—Peoria, Ill.
C. O. Bergholm, District Manager.

Plainview, Texas, Dec. 31, 1926.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Mr. Stamp:

The material you sent regarding program insurance is excellent and appeals to me very much. I will be glad to hav you send me the necessary folders as outlined in your letter and I will endeavor to get some results from them. There are a few men I know whom I believe to be approachable in this way.

As you perhaps know I have been on the fence as to what to do, and after discussing the matter pro and con have decided to stay in the game a while longer. As a result I will take the R. & R. course, and have sent them the wire. Hoping the atmosphere from a mental view may be changed by it.

We have several policy holders here that would like to take advantage of the free medical examination. I have knowledge about the procedure or any blanks I imagine is necessary for this service. I would greatly appreciate your sending me a supply as well as full instructions as to use. Also advise if each one can use their family doctor for this.

I have an application for a 2000 G. P. A. policy that I'm holding as I would rather make sure of a settlement before sending it in instead of possibly being forced to return the policy. I will know definitely in two or three weeks as it all depends on if the man can find steady employment for the winter.

This country is handicapped in the gathering of crops. Too much rain and snow. The farmer
147 has been unable to get in the field since early in December. Called on some prospects yesterday in the country and got stuck in the mud once and had to be pulled out. Another place took me an hour and a half to negotiate one mile. People that expected to have most of their crops in by Christmas are really only started.

Wishing you a Happy New Year from us all, I am,

Yours very truly,

C. O. BERGHOLM.

(b) (Same Letter-head as above letter.)

Plainview, Texas, April 11, 1927.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Mr. Stamp:

Am enclosing my check for $2.00 as a part payment on policy 152798 L. S. Smelser.

When you gave me the program insurance blanks I forgot to take them along leaving them on your desk. Sorry this happened. Would like to have you send them if possible.

Believe the meeting in Dallas did us both a lot of good and we certainly got a lot of new ideas. Perhaps results will be apparent before very long. Just going to get out and get them.

Have to stay in today as Adele is sick. Nothing serious I believe. May get out when Iris comes home. Just have to see somebody. With kindest regards to all, I am,

Very truly yours,

C. O. BERGHOLM.

P. S. Leave word for the weather man to predict a little rain for us.

148 (c) [Same Letter-head as No. (a).]

Plainview, Texas, Aug. 19, 1927.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Mr. Stamp:

Enclosed find an agency contract which I hope you will find satisfactory. Any missing papers I would like to have you forward, and if bond is necessary also a copy of the usual form.

I would greatly appreciate your putting Mr. Kennedy on the mailing list so that he gets a copy of the Texas Spirit as well as any other letters you send out.

Mr. Kennedy will work mostly on his spare time and I will go there from time to time and try to help him along.

Yours very truly,
C. O. BERGHOLM.

(d) [Same letter-head as No. (a).]

Plainview, Texas, Sept. 8, 1927.

Mr. E. R. Otta,
Dallas, Texas.

Dear Sir:

Enclosed find check to cover annual premium of Harvey Byars. Please send receipt.

Yours very truly,
C. O. BERGHOLM.

Mr. Ward promises to pay for sure by the end of this month.

C. O. B.

149 (e) [Same letter-head as No. (a).]

Plainview, Texas.
604 Fresno St., Sept. 25, 1927.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Mr. Stamp:

Nothing else but excuses to offer as it is all I get. Am enclosing Roy McLaughlin note so you will have something to show. Mr. McLaughlin is willing to pay but is in such a shape that he finds it impossible to do so and all we can do is wait until he gets out from under the unexpected load he has to carry for the time being. He had everything figured out including his insurance premium but an unforseen hospital bill put the crimp in the whole business. He said he will write the details when he hears from you. I have not been able to see Frank Lowe lately whose note you have. He just offers excuses as to not wanting the policy, being hard up, etc. C. C. Harris expects to pay me in a few days. Mr. Ward paid me $15.00 and promised to take care of the balance before his next quarterly premium was due. I will see him by Tuesday night if he can be seen. Amy trying to find Hooper and Ritchie.

Doing a little work now and hope to Pete I'll be able to stand up. The M. D.'s don't know where I'll end up as yet and just want us to be careful.

The premium on my policy will be due in a day or two. Want to keep it in the worst way but the rub is I cannot pay the next quarterly premium. In fact we are so broke we don't know where the next meal is coming from. If there is some way to give a note we will do all we can to meet it as well as take care of the nets now due you. A semi-annual premium

I am surely sorry Oscar has not settled for the note. I have talked to him and he has promised to try to make a settlement when he gets paid for directing the band, which he has been taking care of until a new director arrives. He does not know what he will receive, however. He has also said he would send some of the notes he cannot get a settlement for.

It is impossible for me to send you my personal check this month or I would do so. I hope to be able to get Oscar to take care of this. It seems that it takes every penny of my salary for us to live on. If he does not make a decided change I do not know what is to become of us.

I do not like to complain but it seems that things get worse all along. I wonder sometimes if he will ever do anything with life insurance. Three years is a long time to try and make so little sign.

I know, Mr. Stamp, you feel that I am not appreciative after the lovely trip Oscar and I had to Dallas, but he was in bed two months, after school was out and it seemed I had so little time in the remaining time to really work. I tried to see a few people and I managed to see a great many on the list you sent me to see about renewals, although I never did write you to that effect. Nearly all I saw sent in their premiums or part payment.

I know Oscar's is due or perhaps past due. If it is not too late I can send 10% of his and Adele's this week end, but it will be impossible for me to any quarterly premiums now. For Adele's sake I would like to have them kept in force. I suppose, though, I am foolish to try to pay the premiums. If you think I am never mind about writing in regard to them.

152

If Oscar wanted to badly enough I think he could make enough to at least keep his affairs straight and pay his insurance, when all my money goes for ex-

penses and debts. If I spent it on clothing and for personal pleasure it would be different.

I suppose I should be more patient as the doctor tells him still not to work, but that does not make excuses for every thing.

I have often thought of asking you to talk to him about quitting this work. He knows life insurance, I think, but some how he just does not sell it. I think one of his mistakes is in not planning his work systematically.

Do you really think he should stay with the work? I am frank to admit I have tried to get him to find something else to do. You would not blame me either, if you knew how many times we have had nothing but bread and milk for a meal and did not know whether we would have that much for the next.

Please pardon my telling so much of troubles. I think I have duplicated the first letter, but I shall send this on.

I hope that it will not be necessary by the time I get my October salary for me to have to send you a check on what we owe you, but if it is I shall do my best to.

I know Oscar has his faults and has seemed to fail completely in life insurance, but I hope you will not judge him too severely because of his using this money he should have sent you. I know it was wrong and I was shocked when I heard the Ward's policies had not been paid for. I knew when the nets were collected and also, I know, that about that time we were barely existing. That, I know, does not
153 justify his using the company's money, but I do believe it was the reason.

I want you to know I appreciate everything you have done for us. You certainly have been a friend. I am only sorry we have not shown our appreciation any better than we have.

I hope some day to be able to work at least enough that I shall not feel my trip to Dallas was in vain, as far as business is concerned. It surely was not as a pleasure trip. If I had the time I believe I could write some good business this winter. I have a good list of prospects, but I never have a minute to spare, as I do all my work, except laundry.

Assuring you that I shall do all I can to get everything settled at an early date, I am,

Your very truly,
MRS. C. O. BERGHOLM.

(g) [Same letter-head as No. (a).]

Plainview, Texas, Dec. 31, 1927.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Sir:

Enclosed find my checks to cover semi-annual premium of E. N. Covington policy No. 152912 for $16.79 and quarterly premium of $5.35 for policy 152744 S. R. Cantrell.

I have not been able to collect a penny from the others that are still due but as soon as I can get anything whatever I will forward it to you as to square up. Have promise of getting at least a little in the next 30 days.

Wonder why I didn't get any calendars.

With best wishes to all for a Happier 1928
154 than the past has been, I am,
Sincerely,

C. O. BERGHOLM.

(h) Plainview, Jan. 26, 1928.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Mr. Stamp:

Here's hoping the ice is broken and I'll be able to do a little again. Could not get all cash however, the enclosed is all there was.

Saw Mr. Frank Lowe a few days ago. Not much hope. He said he had written you to cancel. I know this can't be done. Said he would write you again. McLaughlin's wife is very ill and I know he will eventually pay. He is just too tied up for the time being. Have not had the heart to speak to him as he lost his first born son and may his wife.

Trying to get an attorney to collect Ritchie's—He tells me however a note without a payee cannot be sued on and judgment gotten. Seems funny.

We are doing all we can to stay alive but to be frank we are about on our last leg.

Yours very truly,
C. O. BERGHOLM.

(i) Plainview, Texas, April 5, 1928.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Mr. Stamp:

I am just wondering if Oscar can not
155 collect on the disability part of his policy.

I tried to get him to make a claim last summer but he would not because he believed it would permanently bar him from taking out any more life insurance, if he collected on a disability clause.

He was disabled for a good deal longer than three months and from what the doctors say it could easily be called disability from the time of his trouble last year.

I talked to Oscar about it and he is of the opinion that he is entitled to it.

I do know he has not been able to work for a long time. He was in bed for about two months last year and for two or three months he was up and down. He would walk down town and back and be almost exhausted. The doctor told him all along not to work, but he felt that he had to and would attempt it, but without success as you know.

It has been discouraging to me at times but I have tried to be patient for I knew he was not well.

Please let me know if he is entitled to any benefits, for we surely are in need of money.

This long spell of sickness is what kept us from being able to pay the last premium, however it began several months previous to the time the premium was due.

Thanking you for any advise you may offer, I am,
Yours truly,
MRS. C. O. BERGHOLM.

156 (j) Plainview, Texas, Aug. 1, 1928.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Mr. Stamp:

I do not know whether Oscar has written you or not. I did not write, as I could not send my check for the amount you are due and felt that a letter would be nothing more than excuses.

It is just about all I can do to exist this summer and I have tried very hard to make some collections. I expect to get something from Mrs. Windwehen tomorrow and if I do I shall enclose it. She is as good as gold, but has had a great deal of trouble. She and two children have been in the hospital, another child had a broken arm and one had a long spell of sickness.

I have been unable to get anything from Oscar Hooper. I went back Monday to see him but he had left the man he was working for and I was told I had as well mark his note "Paid".

I have tried harder to collect Harris' note than any other as he is next door to us and more convenient. He said all along that he could borrow money on his crop after it rained. Oscar talked to him on July 3rd and he said he'd try to borrow money. He never did come over so on around the eighth of July I talked to him and he said he had been but could not get it. The County Clerk's record, however, shows that on July 7th $52.00 was borrowed from the Third National Bank and a mortgage made on his farm.

I went again tonight to see him and since I had no reason to believe what he said and was tired of worrying with him I talked strictly business to him. He said that he had borrowed some money to run his farm and said he didn't intend to try to pay me before he borrowed it. I told him I had tried to
157 be patient and if he had made any effort to make the payment I would not be so urgent, but that I happened to know he had borrowed the money before it rained and that he had denied he could get it. I also told him that I had discussed the matter with a lawyer and that I expected to collect the note. I also told him that I did not want to but that I could cause him a great deal of trouble. The lawyer told me to tell him that I would cause him all the trouble I could, but I tried to be mild.

I have told you before, I think, that he has been in Court on liquor charges. I have no doubt but that he does at times, if not at all times, make liquor and sell it. We have always believed it has been a distributing point. Of course, that has nothing to do with the note, but because of this other trouble I am of the opinion he is afraid of any Court proceedings.

Others believe the same thing.

It looks as if I can not get it without bringing suit and then it would probably be hard to collect because of the laws of Texas.

I wish you would write to him. Could you bring suit against him? Please let me know at once what to do.

Oscar has been gone over a month. He went to his Aunt's but is now in Munising. Doctors think a change will help him. He has already gained thirteen pounds the past month. I often intended writing you that he does not have tuberculosis as I had heard he might have. A great many x-ray pictures were taken which showed good lungs except for pleurisy and I suppose two dozen tests were made of his sputum but no T. B. germs were found.

He may not come back here but I shall be here for this term of school, so if you care to I shall be glad to keep the agency and may try to sell some insurance some day, but if you would like to put some one here that will be all right with me.

158

Perhaps I could work a little anyhow, and besides Mr. Newhansen with the Aetna wanted me to work but I much prefer to sell Peoria Life, if I can get in the right frame of mind. I wish I could work like I did at first, but I have let this debt and trying to make collections worry me so much that I may never be able to sell again.

I intend to get the balance on the nets paid, but I cannot now unless I can do some collecting.

It might be best to send Harris' letter registered. If you think it would help tell him you are writing me for the note and I shall send it.

Yours truly,

(MRS.) C. O. BERGHOLM.

P. S. I received $9.00 from Mrs. Windwehen. Please let me know how much is due on her policy and each of the others.

(k) Plainview, Texas, Aug. 10, 1928.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Mr. Stamp:

I have just received your letter and do not understand how $10.30 is still due on Mrs. Windwehen's note. In the statement it looks as if credit has been given for all the net on her note. You have given credit for $9.80 and in a statement from you dated June 20th you have Windewehen Bal. net $9.80. Does not this settle her note? I was of the opinion that less than a dollar was still due when I sent the $9.00.

I am sorry you did not understand what I meant by selling insurance. I am going to teach this year but I thought I might be able to sell a policy
159 occasionally if I can get back into the work.

There was a time I believe I could have sold insurance had I kept it up, but I have had so many disappointments that I have no confidence in myself as far as selling is concerned. Oscar seemed to fail so completely, and took notes that it seems I will have to take care of with money that is needed for every thing else. Then he let his own insurance drop when he needed it so badly.

Don't you think it is hard to try to tell a prospect the benefits of life insurance when there is not a pennie's worth in your own family. Woman often say, "I would like to see him take it if he would keep it up." All I can say from personal experience is "They don't."

I suppose I am entirely too pessimistic. I hope I am not always, for I think the life insurance field is a wonderful one to those who can conscientiously enter it.

I appreciate the offer you made me provided I care to sell.

Mr. Stamp, I surely will appreciate it if you will try to collect Mr. Harris' note. I never intend to discuss it with him again. I would not have a man talk to me again like he did for the amount of the note. Shall I bring suit or not?

Yours truly,

MRS. C. O. BERGHOLM.

(1) Plainview, Texas, May 8, 1929.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Mr. Stamp:

Three weeks ago tonight Oscar died. Although he has never improved since his last operation, death came as a terrible shock.

160

He had been home four weeks. The first three he seemed much better. The last one was spent largely in bed, but he did not seem in an alarming condition. Sunday and Monday he was up. He had a good night Tuesday, Wednesday until afternoon he seemed to fell all right. Early in the night he became delerious and death came in the morning.

All the doctors who treated him here, Dr. Tearnan in Munising and the doctors at the government hospital in Milwaukee where he was before he came home tried to find the tubercular germ and they made a great many pictures but they never found it. They decided his trouble was an abscessed lung and empyema.

I have never been able to find but one check. I am enclosing it.

There is still a balance due you which I shall try to pay. I have not been able to collect a dollar on these notes. Will you please try to get Cliff Harris to pay his. It is for a little over fifty dollars. After Oscar left he told me Oscar wrote it when he was too sick to know what he was doing. I have proof

that he was not, however, he did become very sick soon afterward. Not that Oscar is gone, he says he never received the policy. I know he did. Is there any way to prove it? I surely wish I could collect this for I need it badly.

All of Oscar's insurance was dropped, so my financial situation is very bad. Did he pay on his and Adele's insurance long enough for them to be any good? I have a letter from the company
161 offering to lend him money on it so that he might keep it in force, if I remember correctly. That seems to me that it would probably have some value. I always felt badly about his not being able to get anything because of the disability clause when he was disabled fully six months before the policy expired and the company knew it. It just doesn't seem quite right. I shall appreciate it if you will let me know of it is any good.

Will I be allowed to keep the agency? I shall be glad to. I have a few prospects and I feel that I must make something more than my salary allows.

When I am able financially I want to protect Adele with insurance. I am very much interested in the educational policy if I can see my way clear to take it. Do you suppose I could get the disability clause? My health is good but I may be too ~~much~~ underweight. I am five feet seven inches and have been weighing around a hundred twenty-five for some time.

Yours very truly,
MRS. C. O. BERGHOLM.

(m) Plainview 3/8/28.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Sir:

I am returning the Eva Nelson policy herewith. They had left here before the policy arrived and gone to New Mexico. Wrote them but my letter was re-

was sent direct to the home office on the
150 Charles Carlton policy for which Mr. Carlton has the receipt. This was sent a few days before the days of grace expired.

I received the premium on Nancy Sanderson policy for which I am enclosing check. This was yesterday and her check and letter is dated August 25 though it arrived here after the Grace period had elapsed. Kindly send me her receipt as I wish to answer her letter. Also change her address to Valdez, Alaska, as she will be there for another year.

I will be satisfactory to me to credit my account with renewal commissions until I get straightened out.

Hope to be in shape to go and work with Mr. Kennedy at Hale Center some day this week. This will be all night work as he does not get through before six and I am prohibited to go out in the night air. Will have to however.

Getting cold here. Almost freezing today. If frost comes now this Panhandle country is blowed up for the year. All crops need at least thirty days more, and more before ripening, as lack of rain delayed the growing this year.

Sincerely,
C. O. BERGHOLM.

(f) [Same letter-head as No. (a).]

Plainview, Texas, Sep. 26, 1927.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Mr. Stamp:

I wrote you as soon as I received your letter but I went so much into details and made the
151 letter so long I would not mail it and have just now found time to write again.

turned. Heard a few days ago they had gone to Kansas but I do not know where.

Don't blame you for being peeved. However, there is two sides to every story. There is nothing wrong with the territory. Times have been hard for the past several months for all business. I know at least three full time insurance men that have given up and left. Better times are coming however.

As for my qualifying for the convention. I don't know. There is no use telling you that since last spring I have been a physical wreck, barely able to be about at times. Due for another x-ray tomorrow of my lungs. I'm satisfied that my break down last spring was due to T. B. and I'm just up and down feeling like the last rose of summer most of the time.

Why don't you come out here and see for yourself how things are?

Yours very truly;
C. O. BERGHOLM.

(n) Plainview, Texas, March 22, 1928.

Mr. Thomas A. Stamp,
Dallas, Texas.

Dear Mr. Stamp:

It will be impossible for Oscar to be in Dallas for the convention.

He has been sick for some time and is confined to his bed now, so that he could not go even if he had qualified.

I suppose you cannot depend on him for anything for a long, long time. He has the same trouble that he had last year and the doctor did not expect him to get it over it then. A couple of months ago he said he gave him up then and that if he had another

spell he couldn't get over it. Of course, they do not know everything and he may recover but it will take a long time.

The picture showed that the old trouble was still there and more besides. There has been an abscess on his lung and it had been draining into the bronchial tubes, causing them to be enlarged.

163 When he is able they are to make a picture of his stomach, also.

I feel sure, now, that he has never been well since he had the pleurisy last year and perhaps even longer than that. I know he was not feeling well when we were in Dallas.

I talked to Mr. Harris tonight about his note. He said he had written you twice but had received no reply. He seems to think that you might let him renew the note, but I tried to explain that his obligation was to us and that, since Oscar is sick, if he does not pay it it is up to me to do it. He said he might be able to borrow some on his crop by the first and pay a part or all, but doubt very seriously if he will make an attempt. If you write him you might make the urge rather strong. Oscar seems to think he could get the money from his brother or mother.

I am going to try very hard to make some collections. I am anxious to get things settled. I would send some along from my salary but it is impossible. It is all I can do to pay the monthly bills and get off some obligations that are older than this. I am just now getting my hospital bill paid that was made a year ago in the fall. I suppose the way I am stating things sounds rather blunt and that I am deliberately putting this second choice, but I am trying to the best of my ability, to do what is right and I shall see that it is paid some time.

Mrs. Windwehen has had a great deal of sickness in her family and an operation. I shall see her as

soon as possible and I believe she will have something. I went one day this week to see her but she was not in.

If you care to give me any suggestions about how to make some collections I shall appreciate it. It is the hardest thing I ever tried to do.

Lowe refused to pay. What can be done
164 about that?

Hoping that the convention will be a great success and regretting that we can not be there again, I am,

Yours very truly,
MRS. C. O. BERGHOLM.

55. The defendant next offered in evidence the testimony of THOMAS A. STAMP, who testified in Court in behalf of the defendant:

My name is Thomas A. Stamp. I live in Dallas, Texas. I am at present State Manager for Texas of the Peoria Life Insurance Company, and have held such position four years last April. My duties as State Manager are to employ agents for the company, to train them, and to look after the business of the company in general, and also to write life insurance. I met Mr. Bergholm sometime about May 1926 at Plainview. I went there to renew his contract. He had a contract under the previous State Manager and I went there to renew it and get him started out writing insurance. He was District Manager. His duties were to write life insurance, to employ agents, to look after the business of the company and to build up this part of the State for the Peoria Life Insurance Company. When I first met him at Plainview, he was living with his wife. He continued in the office of District Manager for our company after my visit to Plainview. It was my custom to go to the homes of the agents at various times. I was up there

perhaps three or four times during the summer and went over his work with him, gave him sales ideas and encouragement and helped him to go out and make sales. On these occasions I became quite well acquainted with his family, in fact very well acquainted.

My relations with him and his family were
165 always very friendly and continued so and are still so. They have always been among bq best friends, the entire family.

By virtue of my duties as State Manager and Mr. Bergholm's duties as District Agent there was occasion for correspondence between us from time to time because the distance is great and we had to keep in touch with him regarding the business and certain doings of the company and plans of the agency in the State, etc. This situation lasted throughout the term of the relationship between us. It was in April 1928 that we received a letter from Mrs. Bergholm telling us that Oscar—that she thought he might have claims for disabilities, and as one of the officers of the company was to be in Dallas in attendance at a State Convention at Dallas, I thought it would be well to take it up with him because I wanted to do everything within my power to help these people. So I took it up with Mr. Patterson and asked him what the chances were or getting this disability claim. Mr. Patterson is the actuary of the company. He was in my office in Dallas when I took it up with him. It was on the 3rd or 4th of April, I think it was the 3rd, in 1928. He was there representing the home office officials at our annual State meeting, and there not only to speak to agents but to take up any matters of business in the State of Texas regarding any matter. Our state convention was held that year on the 4th of April, 1928. I stated in my letter "The Home Office has written us that the claim can not be allowed as the policy is not now in force." I don't recall any correspondence, any writing that I had with the home

office regarding this matter. I have searched my files for any correspondence between me and the Home Office regarding this matter. This letter was written right after the State Convention and I wrote
166 a great many letters about many matters of business to agents as well as policy holders, and especially a great many after the convention, and this matter was of such importance that I took it up with an official, but the letter is either a mistake on my part in saying that I had written the home office, or a mistake on my Cashier's part in writing the letter. I thought it was of sufficient importance to take it up with an official directly because I wanted to do the very best by the Bergholms that I could, but in my writing a great many letters and dictating some of the letters, I would just give them to Otta. Anyway there is just a mistake somewhere. The office did not write me regarding that claim. Previous to that time I had never taken the matter up with any member of the home office or any official or agent of the Home Office regarding the payment of the claim. I received in due course of mail about the time of the dates of the letters, the letters marked Defendant's Exhibits Nos. 13 and 14, which have already been introduced in evidence. The letter of Mrs. Bergholm written April 5, 1928, is the letter to which I refer in my reply to her dated April 9, 1928. Previous to that time I had never received any letter or word in any letter whatsoever suggesting that there was any claim for disability, or that there was any condition suggesting disability. I had never received any request from either one of them in person in the nature of a request for disability benefits at any time since the policy had been written. I had seen them both from time to time.

The Dallas office is in my charge and the books are kept under my general supervision as Manager, but I have a Cashier and bookkeeper and they have charge

of the details and do the work. As Manager
167 of the company and in the execution of my duties for the company and from my knowledge of the records of the office, I know when the last premium on this policy of Mr. Bergholm's was paid. The first two quarterly premiums of the second year were paid, the first February 27th, and the second in May or latter part of May, when $50.55 was paid. That was the second quarterly premium for the second policy year. No other premium was ever paid on the policy after that time.

On Cross Examination.

In response to questions propounded to him by counsel for the plaintiffs, Mr. Stamp testified as follows:

In my letter of April 9, 1928, we refer to Mrs. Bergholm's statement in her letter of April 5, 1928, that she thought he had the T. B. She wrote that letter in the spring of 1928. I understand that T. B. means tuberculosis of the lungs. I regard that as a disability of a permanent character. That was information that Mrs. Bergholm furnished me at that time by that letter of April 5, 1928. I accepted her statement as being true as far as she knew. I think it could have been made truer by being sworn to, naturally. There is nothing in the policy requiring the proof to be sworn to but they require proof. In my letter of April 9, 1928, I undertook to state the contents of a letter from the Home Office at Peoria, Illinois. The letter is before me. I have explained that. That letter is signed by me. (At the request of plaintiffs' counsel the witness read to the jury that part of the letter put in quotations which he said he had received from the Home Office at Peoria): "To entitle insured disability benefits this policy at the time

of making claim must be in full force, all premiums due prior to the time of making claim must have been duly paid by the insured." I represented in
168 that letter that I wrote her that I had received a letter from the Home Office. I am not certain that I would have known at the time I wrote that letter whether or not I had received a letter from the home office. I had a great many letters and a great deal of correspondence to take up. The letter was dictated by myself. It is signed by my stenographer for me. I am not certain I did dictate the letter because a lot of letters at this time I just gave my stenographer the ideas and told him to write this or that. He does a lot of it. He has been with the company for six or seven years and can go without a lot of detailed directions, and I may have instructed him to write this letter and he took it up by himself. I do that very often. I may have done it in this instance. I am not certain whether I dictated this letter in part or just told him to write the letter. I may have given him the idea and he wrote the letter. I did not say that I gave him the idea that I had received the letter from the Home Office. I gave him the idea that he should write this letter after a personal conference with the Actuary from the Peoria office. Mrs. Bergholm made the first claim in March 1928. I thought she was making claim for disability benefits when she wrote in March 1928. I took it up with the Actuary. I am not capable of making any decision as to whether a disability is a permanent one. It is out of my territory entirely. As to whether or not it is my contention that in order for an insured or beneficiary to get the benefit of the disability clause that such person must make that claim and proof of total and permanent disability when that condition occurs, that is when the person becomes totally and permanently disabled, and as to whether or not Mr. Bergholm or Mrs. Bergholm should have made that proof and

have sworn to it, my answer is that that
169 is defined plainly in the terms of the policy. They should have made that kind of proof and sworn to it when the policy was in force and good standing. I am not in a position to say that on the last day of grace which we contend was September 27, 1927, either Mr. or Mrs. Bergholm should have known that an abscess of the side was a permanent disease, permanent and incurable disease, and that they should have sworn or could have sworn to it on that day.

Mr. Otto, the gentleman here in Court, was present in my Dallas office on April 3rd or 4th, 1928, at the time I have stated that I had the conversation with Mr. Patterson, the Actuary.

56. The defendant next offered in evidence the testimony of EARL R. OTTA, who testified in Court in behalf of the defendant as follows:

My name is Earl R. Otta. I am Cashier of the Peoria Life Insurance Company at the state office in Dallas. I have been Cashier of that office since February 1, 1926, and have been connected with the Peoria Life Insurance Company since June 1, 1923. My duties as Cashier of the State Agency at Dallas are to write letters to policy holders and also to agents, to collect renewal premiums and renewal premium notes from policy holders and agents, and receive policies written by agents and forwarded to the state office and in turn to forward them to the Home Office, and receive policies from Peoria as they are issued and forward them to the agent and the policy holders, and to send out requested blanks for completion of proofs of death and disability, and when they are properly completed and sent to me I merely forward them to the Home Office in Peoria. I met

C. O. Bergholm in Dallas at a convention
170 we had April 4th and 5th, 1927. In the execution of my duties I kept a record of his premium payments as and when they were paid on his policy, which is being sued on in this case. I kept the records myself. The premium which was due on his policy in February 1927 was paid in March, 1927, and the premium which was due in May 1927 was paid in June 1927. No other premiums were ever paid on the policy. I heard Mr. Stamp's testimony about a conversation with Mr. Patterson. I was present through all of the conversation. We had received in the Dallas office a letter from Mrs. Bergholm dated March, 1928, stating that Oscar did not have T. B., made some reference to T. B., and wanted to know if a claim could be made, and we held it until Mr. Patterson, the actuary of the company could be in Dallas, we were expecting him to be there to attend the convention, and when he arrived Mr. Stamp and I went in the room, and mentioned the fact that he had received a letter and wanted to know what could be done about it. The first thing he said was, "Let me see the card on it." I showed him that card, and he said, "This policy has lapsed." We told him that was our understanding, and he told us to advise the insured that the policy was lapsed, and he said, "Bring out in your letter that the wording of the disability clause was as it is," and when I wrote the letter I quoted from the disability clause in writing that letter.

On Cross Examination.

In response to questions propounded to him by plaintiffs' counsel, Mr. Otta testified:

I typed the letter. It may not have been original, I may have made it myself or Mr. Stamp may have gave it to me, I don't remember. The Home Office

had told us in person through the Secretary
171 and Actuary of the Company, which I considered the same as writing. The Actuary is not a man authorized to pass on disability claims. We sought instructions from him because he was a Home Office official and the policy premium had not been paid and he could tell by a casual look that it would not be a claim. I did not undertake to quote the home office without quoting anybody with authority to represent the Home Office. I was quoting the Secretary and Actuary. He would naturally have some power, but as I understand it no disability claim or death claim can be passed on by any one man, it must be passed on by a committee. I had received the oral statement. I was mistaken about it, saying it was written.

Defendant rested.

No further evidence was offered or introduced.

57. The defendant then submitted to the Court its request for an instructed verdict, which is shown on page of the transcript of the record in this case.

58. The plaintiffs were permitted to file their trial amendment to plaintiffs' amended petition.

59. The plaintiffs then submitted to the Court the following request for an instructed verdict:

"Now comes plaintiff and moves the Court to instruct the jury to return a verdict in favor of plaintiff," and the Court instructed the jury to return a verdict for the plaintiffs as is shown in the judgment rendered in this cause, and shown in the transcript of the record in this case on page 62.

60. The defendant then submitted to the Court the following exceptions to the Court's charge:

172 Defendant's Exception to Charge of the Court and Order overruling same, omitted from the printed record, being heretofore copied at page 54.

* * * * * * * *

178 61. It is hereby agreed between the parties hereto that the foregoing statement of facts consisting of ..... pages numbered from 1 to ....., inclusive, constitutes a full, true and correct statement of the facts and all of the evidence
179 admitted by the Court on the trial of this cause, and agree that the same shall constitute the Bill of Exceptions in this case, and, as such, is correct.

GEO. R. BEAN,
E. L. KLETT,
BEAN & KLETT,
Attorneys for Plaintiffs.
WILSON, RANDAL & KILPATRICK,
ROSCOE WILSON,
J. I. KILPATRICK,
Attorneys for Defendant.

The foregoing Bill of Exceptions having been submitted to me is hereby settled and allowed on this 25th day of August, A. D. 1930.

(Signed) JAMES C. WILSON,
United States District Judge
Presiding.

1791/2 NOTICE OF APPEAL.

Filed Aug. 23, 1930.

(Title Omitted.)

To the plaintiffs, Mrs. Iris Christine Bergholm and Adele Bergholm, or Messrs. Bean & Klett, Geo. R. Bean and E. L. Klett, their attorneys of record:

You are hereby notified that the defendant Peoria Life Insurance Company has appealed from the judgment entered in this cause on June 25, 1930, as fully appears from the record of said cause, said appeal being taken to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, La., to correct the errors alleged to have been committed on the trial of the said cause and to reverse the judgment of the said trial Court.

WILSON, RANDAL &
KILPATRICK,
ROSCOE WILSON,
J. I. KILPATRICK,
Attys. for Defendant.

We, the undersigned attorneys for the plaintiffs in this cause, hereby waive time and service of the foregoing notice of appeal and agree that this waiver shall have full force and effect as if notice of said appeal were served on us as required by law.

Dated at Lubbock, Texas, this August 23rd, 1930.

BEAN & KLETT,
GEO. R. BEAN,
E. L. KLETT,
Attys. for Plaintiff.

180 PETITION FOR APPEAL.

Filed Aug. 25th, 1930.

(Title Omitted.)

To Honorable Jas. C. Wilson, Judge of said Court:

Now comes Peoria Life Insurance Company of Peoria, Illinois, and respectfully shows that on the 25th day of June, 1930, upon the trial of this cause a verdict was returned against your petitioner under the instruction of the Court, and upon said verdict a final judgment was entered on the said 25th day of June, 1930, against your petitioner, defendant in the said cause, and in favor of the plaintiff, Mrs. Iris Christine Bergholm, one of the plaintiffs, for the sum of two thousand seven hundred and forty nine dollars and fifty cents ($2,749.50), and in favor of the plaintiffs, Mrs. Iris Christine Bergholm and Adele Bergholm, a minor, suing by her next friend, Mrs. Iris Christine Bergholm, jointly for the sum of $1024.00, with interest on both of said amounts from the date of said judgment until paid at the rate of six per cent per annum, and costs of suit.

Feeling itself aggrieved by such verdict and judgment, your petitioner hereby applies to the Court for an order allowing it to appeal to the Circuit Court of the United States for the Fifth Circuit at New Orleans, La., and also to allow it to supersede the said judgment by filing of bond in accordance with the laws of the United States in such causes made and provided and that the amount of such bond be fixed by the Court, and that the bond hereby tendered in such amount as the Court may require be approved. Your petitioner avers that in such verdict and judgment and the proceedings had prior thereto certain manifest errors were permitted to the prejudice of

this defendant, all of which will appear in more detail from the defendant's assignments of error which are presented with this petition.

The plaintiffs are residents of Lubbock
181 County, Texas, and their attorneys are Messrs. Bean & Klett, a partnership composed of Hon. George R. Bean and E. L. Klett, who reside in the City of Lubbock, Lubbock County, Texas, and whose office is in the Citizens National Bank building in said city.

Wherefore, your petitioner prays that it be allowed such appeal, and citation issue hereon, and that the said judgment and proceedings had in this case be removed to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, La., in said circuit, for the revision and correction of the errors so complained of, and for a reversal of said judgment, and the defendant desiring as hereabove stated to supersede the said judgment and the proceedings had in this cause and stay the enforcement thereof, tender bond in such amount as the Court may require, and pray that the allowance of the appeal and supersedeas be issued.

WILSON, RANDAL &
KILPATRICK,
ROSCOE WILSON,
J. I. KILPATRICK,
Lubbock, Texas, Attys. for
Petitioner.

Allowed on this 25th day of August, 1930, the Supersedeas being fixed in the amount of ten thousand dollars.

WM. H. ATWELL,
District Judge.

182 CITATION.

Filed Aug. 26, 1930.

United States of America,

The President of the United States.

To Mrs. Iris Christine Bergholm and Adele Bergholm and E. L. Klett and Geo. R. Bean, comprising the law partnership or firm of Bean & Klett, solicitor of record—Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit, to be held at the City of New Orleans, in the State of Louisiana, within thirty days from the date of this writ, pursuant to an order of appeal filed in the Clerk's office of the Court of the United States for the Northern District of Texas, wherein Peoria Life Insurance Company of Peoria, Illinois, is appellant and Mrs. Iris Christine Bergholm and Adele Bergholm, a minor, suing by her next friend, Mrs. Iris Christine Bergholm, a widow, are appellees to show cause, if any there be, why the decree in said order of appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles Evans Hughes, Chief Justice of the United States, this 25th day of August, 1930, A. D., and of the Independence of the United States the 155th year.

WM. H. ATWELL,
United States District Judge.

Mrs. Iris Christine Bergholm and Adele Bergholm, plaintiffs (appellees) hereby acknowledge receipt of a copy of defendant's petition for allowance of appeal, assignments of errors, and order of the Judge thereon, and hereby waive the issuance and service upon them of citation or further notice, and enter their appearance in this cause upon its appeal to the Fifth Circuit Court of Appeals at New Orleans, La.

Dated at Lubbock, Texas, this 25th day of August, 1930.

GEO. R. BEAN,
E. L. KLETT,
Solicitors for Mrs. Iris Christine Bergholm and Adele Bergholm, plaintiffs, (Appellees).

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183 DEFENDANT'S ASSIGNMENTS OF ERROR.

Filed Aug. 23, 1930, and Aug. 30, 1930.

(Title Omitted.)

To Honorable Jas. C. Wilson, Judge of said Court:

Now comes the Peoria Life Insurance Company of Peoria, Illinois, defendant in this cause, and in connection with its appeal in this case assigns the following errors which it avers occurred on the trial of this case, and upon which it relies to reverse the judgment entered herein as appears of record:

1. The Court erred in overruling the defendant's General Demurrer to the plaintiffs' amended petition.

2. The Court erred in overruling the defendant's special exception contained in paragraph 3 of its answer, wherein it excepted to the plaintiffs' amended petition because of the failure of the plaintiffs to allege with certainy what amount they were seeking in this suit.

3. The Court erred in overruling the defendant's special exception contained in Paragraph 4 of its answer, wherein it excepted to that portion of plaintiff's amended petition contained in paragraph No. 7, wherein it was alleged that the payment of the first premium of $190.70 would keep the policy in force until March 20, 1927, and that payment of the next two quarterly premiums kept the policy in force until September 20, 1927.

4. The Court erred in overruling the defendant's special exception contained in paragraph No. 5 of its answer, excepting to that portion of plaintiffs' petition contained in paragraph No. 8.

184 5. The Court erred in overruling the defendant's exception contained in paragraph No. 6 of its answer wherein it excepted to that portion of plaintiffs' petition contained in paragraph No. 9.

6. The Court erred in overruling defendant's special exception contained in paragraph No. 7 of its answer wherein it excepted to that portion of plaintiffs' petition contained in paragraph No. 10, alleging that Mrs. Bergholm, one of the plaintiffs, the wife of the defendant, nor the deceased had an opportunity to see to the collection for income disabilities on account of the insured's sickness and his wife's work.

7. The Court erred in overruling the defendant's special exception contained in paragraph No. 8 of its

answer excepting to that portion of plaintiffs' petition contained in paragraph No. 10, alleging that on or about the months of February, April or May, 1928, and in May and July, 1929, the plaintiff, Mrs. Bergholm, furnished such notice and proof as she felt was required and would be satisfactory, and asked the company for assistance and advice.

8. The Court erred in overruling defendant's special exception contained in paragraph No. 9 of its answer, excepting to that portion of plaintiffs' petition contained in paragraphs Nos. 10 and 13, alleging that the notices, proofs, claims and demands were made more than thirty days prior to the filing of the suit, and that therefore the plaintiff was entitled to recover statutory penalty and attorney's fees, because it was not shown how much was demanded nor what her claim was for.

9. The Court erred in refusing the defendant's request for an instructed verdict, which request was duly presented to the Court, as follows:

185 "Now comes the defendant, after both sides have rested, and before argument of the case, and before the Court has submitted to the jury any charge, and requests the Court to instruct the jury to return a verdict in its behalf and against the plaintiff in substance as follows:

You are instructed to return the following verdict:

We, the jury, find for the defendant in this case and against the plaintiff that the plaintiff should recover nothing from the defendant."

"The foregoing request for a directed verdict was duly presented to the Court and refused, to which the

defendant duly excepted, and is hereby allowed as a Bill of Exception.

JAS. C. WILSON,
District Judge."

10. The Court erred in refusing the defendant's request for an instructed verdict because the uncontroverted evidence shows that the policy sued upon lapsed on September 26th, 1927, for failure to pay premium then due, and that no claim for disability benefits under said policy was made until April 5, 1928, and that the policy provides that to entitle the insured to the disability benefits, the policy at the time of making claim for same must be in full force and all premiums becoming due prior to the making of the claim must have been duly paid by the insured.

11. The Court erred in refusing defendant's request for an instructed verdict because the uncontroverted evidence shows that the quarterly premium due on the policy sued upon on August 5th, 1927, was not paid on such date nor on September 26th, 1927, within the grace period, nor thereafter, and that the said policy provides that to entitle the insured to the disability benefits, that such policy at the time of making claim for such benefits must be in full force and all premiums becoming due prior to making such claim must have been duly paid, and that no claim for such benefits was made at any time, and that on April 5th, 1928, for the first time, the plaintiff Mrs. Bergholm wrote a letter to the Texas State Manager's Office asking if the insured was not entitled to disability benefits, and that no further claim or demand was made until after the death of the insured, and no legal excuse for failure to pay premiums when due or to make the claim within the time provided by the policy was shown or attempted to be shown.

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12. The Court erred in instructing the jury to find as follows:

"That plaintiff and her minor daughter, Adele Bergholm, by her next friend, Mrs. Iris Christine Bergholm, are entitled to income disability benefits payable to the insured for the period of time from and including November 1, 1927, to April 1, 1929, amounting to $900.00 with six per cent interest on each of said installments from the maturity thereof, amounting to $124.00, amounting in all to $1024.00, with six per cent interest thereon from date."

13. The Court erred in instructing the jury to find as follows:

"That plaintiff and her minor daughter, Adele Bergholm, by her next friend, Mrs. Iris Christine Bergholm, are entitled to income disability benefits payable to the insured for the period of time from and including November 1, 1927 to April 1, 1929, amounting to $900.00 with six per cent interest on each of said installments from the maturity thereof, amounting to $124.00, amounting in all to $1024.00, with six per cent interest thereon from date."

187 The action of the Court in so instructing the jury is error in that the uncontroverted evidence shows that the policy sued upon lapsed for failure to pay premium on September 26, 1927, the last day of grace, and that no claim for such benefits was made until April 5, 1928, the policy providing that to entitle the insured to disability benefits the policy must be in full force and all premiums becoming due prior to making the claim must have been duly paid by the insured.

14. The Court erred in instructing the jury to find as follows:

"That plaintiff and her minor daughter, Adele Bergholm, by her next friend, Mrs. Iris Christine Bergholm, are entitled to income disability benefits payable to the insured for the period of time from and including November 1, 1927, to April 1, 1929, amounting to $900.00 with six per cent interest on each of said installments from the maturity thereof, amounting to $124.00, amounting in all to $1024.00, with six per cent interest thereof from date."

Such action of the Court in so instructing the jury is error in that the uncontroverted evidence shows that the deceased (insured) was an experienced insurance man and knew the premiums of his policy and knew when his premiums were due, and advised the defendant that he could not pay the premiums and that he expressly refused to make any claim for benefits.

15. The Court erred in instructing the jury to find as follows:

"That plaintiff and her minor daughter, Adele Bergholm, by her next friend, Mrs. Iris Christine Bergholm, are entitled to income disability benefits payable to the insured for the period of time from and including November 1, 1927, to April 1, 1929, amounting to $900.00 with six per cent interest on each of said installments from the maturity thereof, amounting to $124.00, amounting in all to $1024.00, with six per cent interest thereon from date."

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The action of the Court in so instructing the jury is error in that the evidence is insufficient to show that

the insured was disabled as claimed before default in the payment of his premiums, and is therefore insufficient to support such instruction or verdict in that the only evidence adduced on the trial of this case tending to show such fact was the letters written by Bergholm, the deceased, who was a District Agent of the defendant company, to the State Manager, his superior officer, on routine matters regarding his employment, in which there were occasional statements that the insured was ill, and the letters from the State office of the defendant occasionally stating that the writers of such letters were sorry to learn that he was ill, there being no other evidence or any other proof of disability made to the defendant company other than such statements until March and April, 1928, six months after the policy had elapsed for failure to pay premiums.

16. The Court erred in instructing the jury to find as follows:

"We, the jury, find that the policy sued on was in full force and effect at all times from and after the date of its issuance to the date of the death of the insured, and the defendant is liable thereon; that the defendant became indebted on said policy to the plaintiff in the sum of five thousand dollars, which by the terms of the policy became a trust fund for the plaintiff, bearing interest at the rate of three and one-half per cent per annum from and after June 1, 1929, and payable to the plaintiff in monthly instal-
ments of fifty dollars each, beginning June
189 1, 1929; that eleven of such installments of fifty dollars each are past due and unpaid and the plaintiff is entitled to recover from the defendant for said eleven unpaid installments amounting to $650.00, with six per cent interest thereon from

the maturity of said installments amounting to $19.50, and statutory penalty of twelve per cent on said unpaid installments and interest amounting to $80.00, and amounting in all to $749.50, which shall draw six per cent interest from date; that plaintiff is also entitled to recover statutory reasonable attorney's fees of $2000.00, which shall draw six per cent interest from date."

17. The Court erred in instructing the jury to find as follows:

"We, the jury, find that the policy sued on was in full force and effect at all times from and after the date of its issuance to the date of the death of the insured, and the defendant is liable thereon; that the defendant became indebted on said policy to the plaintiff in the sum of five thousand dollars, which by the terms of the policy became a trust fund for the plaintiff, bearing interest at the rate of three and one-half per cent per annum from and after June 1, 1929, and payable to the plaintiff in monthly installments of fifty dollars each, beginning June 1, 1929; that eleven of such installments of fifty dollars each are past due and unpaid and the plaintiff is entitled to recover from the defendant for said eleven unpaid installments amounting to $650.00, with six per cent interest thereon from the maturity of said installments amounting to $19.50, and statutory penalty of twelve per cent on said unpaid installments and interest amounting to $80.00, and amounting in all to $749.50, which shall bear six per cent interest from date; that plaintiff is also entitled to recover statutory
190 reasonable attorney's fees of $2000.00, which shall draw six per cent interest from date."

Such instruction was error in that the uncontroverted evidence shows that the policy sued upon had

lapsed for failure to pay premium on September 26, 1927, and that the insured died in April, 1929, and the policy provides that failure to pay premiums when due shall cause the policy to cease and determine, and there was no evidence offered by the plaintiff to show any legal excuse for failure to pay such premiums.

18. The Court erred in instructing the jury to find as follows:

"That the policy sued on was in full force and effect at all times from and after the date of its issuance to the day of the death of the insured and the defendant is liable thereon."

19. The Court erred in instructing the jury to find as follows:

"That the policy sued on was in full force and effect at all times from and after the date of its issuance to the day of the death of the insured and the defendant is liable thereon."

Such instruction was error in that the uncontroverted evidence shows that the policy sued on provides that failure to pay premiums when due should cause the policy to terminate, and that the premium which was due on August 27, 1927, was not paid on said date, nor within the thirty days grace period following, nor thereafter, and that no claim for any disability benefits which would keep the policy alive was ever made in due time, and that the deceased was fully acquainted with the provisions in the policy and deliberately refused to make any claim for the disability benefits during his lifetime.

191. 20. The Court erred in instructing the jury to find as follows:

"That the plaintiff is also entitled to recover statutory reasonable attorney's fees of $2000.00, which

shall draw six per cent interest from date." And in further instructing the jury to find as follows: "That the plaintiff is entitled to recover from the defendant * * * statutory penalty of twelve per cent on said unpaid installments and interest amounting to $80.00."

2. The Court erred in instructing the jury to find as follows:

"That the plaintiff is also entitled to recover statutory reasonable attorney's fees of $2000.00, which shall draw six per cent interest from date." And in further instructing the jury to find as follows: "That the plaintiff is entitled to recover from the defendant * * * statutory penalty of twelve per cent on said unpaid installments and interest amounting to $80.00."

Such instructions were error in that there was no evidence introduced showing or tending to show that any demand was ever made on the defendant for payment of monthly death benefits, and the evidence shows that the plaintiff demanded payment in full for five thousand dollars death benefits.

22. The Court erred in instructing the jury to find as follows:

"The plaintiff is also entitled to recover statutory reasonable attorney's fees of $2000.00, which shall draw six per cent interest from date."

Such instruction was error in that such sum is grossly excessive, the principal amount recovered by Mrs. Bergholm, the plaintiff, being only
192 $650.00 on the death benefits, and the sum recovered by both plaintiffs on which no penalty or attorney's fees was allowed being $1024.00, the attorney's fees allowed being grossly in excess of

the principal sum recovered by Mrs. Bergholm and more than both amounts allowed the plaintiffs, and the only evidence offered as to the reasonableness of such sum was the testimony of E. L. Klett, the attorney for the plaintiff, who was an interested party.

23. The Court erred in instructing the jury to find as follows:

"Eleven of such installments of fifty dollars each are past due and unpaid and the plaintiff is entitled to recover from the defendant for said eleven unpaid installments amounting to $650.00," in that eleven installments of fifty dollars each amount only to $550.00 and not $650.00, and such sum is to that extent excessive.

24. The Court erred in instructing the jury to find as follows:

"That the plaintiff and her minor daughter * * * are entitled to income disability benefits payable to the insured for the period of time from and including November 1, 1927, to April 1, 1929, amounting to $900.00, with six per cent interest on each of said installments from maturity thereof, amounting to $124.00, and amounting in all to $1024.00 with six per cent interest from that date."

Such instructions were erroneous in that the sums are excessive, in that the period of time is seventeen months and the disability benefits, according to the policy, was fifty dollars per month, which would amount only to $850.00, and there is no pleading on which a verdict for interest on such installments from maturity, amounting to $124.00, might be
193 arrived or based, and no pleadings on which to base the verdict for six per cent interest

from maturity until the date of the judgment and six per cent interest thereafter.

25. The Court erred in rendering judgment against the defendant and in favor of the plaintiffs, or either of them, for any sum because the uncontroverted evidence is insufficient to support the instructed verdicts and insufficient to support the judgments, in that such uncontroverted evidence shows that the policy sued upon lapsed for failure to pay premiums on September 26, 1927, and that no claim for income disability benefits was made within the time required by the policy, and that the insured died in April, 1929, long after the policy lapsed.

26. The Court erred in rendering judgment against the defendant and in favor of the plaintiff, Mrs. Iris Christine Bergholm, for the sum of $2749.50 with interest thereon from date at the rate of six per cent per annum, for the reasons hereinabove stated.

27. The Court erred in rendering judgment against the defendant and in favor of both of the plaintiffs for the sum of $1024.00 with interest thereon from date at the rate of six per cent per annum for disability benefits for the reasons hereinabove stated, and because the policy lapsed as hereinabove stated, as is shown by the uncontroverted evidence before any claim was ever made for such benefits, and that no proof of such disability was timely made, and the evidence is insufficient to support such judgment and the verdict on which such judgment is based.

28. The Court erred in rendering judgment for the plaintiff, Mrs. Iris Christine Bergholm, for the sum of $2749.50, with interest thereon from date at

the rate of six per cent per annum, because
194 such judgment is excessive in that it includes the sum of $2000.00 with interest thereon from date at the rate of six per cent per annum as attorney's fees, which sum is greatly in excess of the amount awarded to the plaintiff, Mrs. Iris Christine Bergholm.

Wherefore, the defendant prays that the judgment be reversed and that the verdict be set aside.

And the defendant (appellant) prays on appeal that the judgment of the trial Court be reversed and that judgment be rendered in its favor by the Appellate Court, and in the alternative that the cause be remanded.

WILSON, RANDAL & KILPATRICK,
ROSCOE WILSON,
J. I. KILPATRICK,
Attorneys for Defendant.

---

195 ORDER ALLOWING APPEAL AND SUPERSEDEAS.

Filed Aug. 25, 1930.

(Title Omitted.)

On this 25th day of August, 1930, upon consideration of the petition of the defendant in this cause for an allowance of an appeal and supersedeas, it is ordered that such appeal be allowed, upon the defendnt (appellant) giving supersedeas bond according to law in the sum of ten thousand dollars.

And the said defendant having here and now presented such bond to the Court, conditioned as provided by law in said sum, the same is hereby in all things allowed, and it is ordered that the same operate as a supersedeas herein.

WM. H. ATWELL,
District Judge.

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196 ORDER ALLOWING APPEAL AND AND SUPERSEDEAS.

Filed Aug. 25, 1930.

(Title Omitted.)

On this 25th day of August, 1930, the petition of the defendant in this cause for an allowance of an appeal and supersedeas, with Assignments of Errors, being submitted to Hon. Wm. H. Atwell, a Judge of this Court, the Honorable James C. Wilson, the Judge of this Court who tried this case being out of the district and not available, it is hereby ordered that such appeal be allowed upon the defendant (appellant) giving supersedeas bond according to law in the sum of Ten Thousand and no/100 ($10,000.00) Dollars.

And the said defendant having here and now presented such bond to the Court, conditioned as provided by law in said sum, the same is hereby approved and ordered filed, and the appeal is hereby in all things allowed, and that the said appeal with such bond operate as a supersedeas herein, and that proceedings in this Court be stayed pending such appeal.

and that the cause be transferred to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans, La., and that the record be filed in such Court as provided by law.

WM. H. ATWELL,
District Judge.

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197 BOND.

Filed Aug. 25, 1930.

(Title Omitted.)

Whereas, in the above entitled and numbered cause pending in the United States District Court for the Northern District of Texas, Lubbock Division, at a regular term of said Court on the 23rd day of June, 1930, the plaintiff, Mrs. Iris Christine Bergholm, a widow, recovered from the defendant, Peoria Life Insurance Company of Peoria, Illinois, the sum of Two Thousand Seven Hundred Forty-nine and 50/100 ($2749.50) Dollars, with interest thereon from date at the rate of 6% per annum and costs of suit, and the plaintiffs, Mrs. Iris Christine Bergholm and Adele Bergholm, a minor, by her next friend, Mrs. Iris Christine Bergholm, jointly recovered of and from the defendant, Peoria Life Insurance Company of Peoria, Illinois, the sum of One Thousand Twenty-four ($1025.00) Dollars, with interest thereon from date until paid at the rate of 6% per annum and costs of suit, from which judgment the defendant, Peoria Life Insurance Company of Peoria, Illinois, has appealed to the United States Circuit Court of Appeals for the Fifth Circuit, and has filed herein its petition

for appeal, which petition has been granted, and the said defendant desires to supersede the said judgment;

Therefore, the Peoria Life Insurance Company of Peoria, Illinois, as Principal, and the undersigned as Surety, acknowledge themselves bound to pay to the said Mrs. Iris Christine Bergholm and Adele Bergholm the sum of Ten Thousand and no/100 ($10,000.00) Dollars, to which payment well and truly to be made they bind themselves, their successors or assigns, jointly and severally by these presents, conditioned that the said Peoria Life Insurance Company of Peoria, Illinois, shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea or appeal good.

198

Witness the signature and seal of the Peoria Life Insurance Company of Peoria, Illinois, as Principal, and the undersigned as Surety, this 25th day of August, 1930.

PEORIA LIFE INSURANCE COMPANY, OF PEORIA, ILLINOIS,
By EMMET C. MAY, President,
Principal.

Attest:

....., Assistant Secretary.

(Corp. Seal)

ROYAL INDEMNITY COMPANY,
By J. DALLAS SMITH,
Attorney-in-fact.

ROYAL INDEMNITY COMPANY,
By MARSHALL L. BROWN,
Atty-in-fact. Surety.

(Seal)

Countersigned at Wichita Falls, Texas, by

.....

Authorized Representative.

By .....

Approved:

WM. H. ATWELL,
U. S. Dist. Judge.

Aug. 25, 1930.

(Power of Attorney attached to the above.)

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199 PRAECIPE AND WAIVER OF SERVICE.

(Title Omitted.)

To the Clerk of Said Court:

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, New Orleans, La., on appeal from this Court, and include in said transcript the following proceedings, pleadings and papers on file:

1. Plaintiffs' Original Petition.
2. Petition for Removal.
3. Bond.
4. Order of Removal.
5. Plaintiffs' Amended Original Petition.
6. Defendant's First Amended Original Answer.
7. Order Overruling Defendant's General Demurrer and Special Exceptions.
8. Plaintiffs' Trial Amendment.
9. Plaintiffs' Request for Instructed Verdict.
10. Defendant's Request for Instructed Verdict.

11. Verdict of the Jury.

12. Defendant's Exceptions to the Court's Charge.

13. Final Judgment.

200 14. Order extending time.

15. Bill of Exceptions.

16. Notice of Appeal.

17. Petition for Appeal.

18. Citation with Waiver.

19. Defendant's Assignments of Errors.

20. Order allowing Appeal and Supersedeas.

21. Order allowing Appeal and Supersedeas.

22. Bond.

23. This Praecipe.

WILSON, RANDAL & KILPATRICK,
ROSCOE WILSON,
J. I. KILPATRICK,
Attorneys for Defendant.

Service of copy of the foregoing praecipe in this cause is acknowledged this 30th day of August, 1930, and it is agreed that the record should contain the matters set out in the foregoing and no other.

BEAN & KLETT,
GEO. R. BEAN,
E. L. KLETT,
Attorneys for Plaintiffs.

201 CLERK'S CERTIFICATE.

I, GEO. W. PARKER, Clerk of the U. S. Distrct Court in and for the Northern District of Texas, hereby certify that the above and foregoing is a true and correct transcript of the record in cause No. 12 at Law wherein Mrs. Iris Christine Bergholm and Adele Bergholm are plaintiffs, and Peoria Life Insurance Company is defendant, and that the foregoing 200 pages contain a full, complete and true copy of the orignal papers on file and of record in said cause as shown by the praecipe for record filed herein.

Witness my hand officially and the seal of the District Court of the United States for the Northern District of Texas, at Lubbock, this 20 day of September, 1930.

(Seal)

GEO. W. PARKER, Clerk,
By OLIVE FLUKE, Deputy.

Minute entry of argument and submission, December 8, 1930, omitted in printing.

In United States Circuit Court of Appeals for the Fifth Circuit

No. 6042

Peoria Life Insurance Company of Peoria, Illinois, Appellant,

versus

Mrs. Iris Christine Bergholm et al., Appellees

Appeal from the District Court of the United States for the Northern District of Texas

J. I. Kilpatrick and Roscoe Wilson for Appellant.
E. L. Klett and Geo. R. Bean for Appellees.

Before Bryan, Foster, and Walker, Circuit Judges

Opinion of the Court—Filed June 5, 1931

Walker, Circuit Judge:

This was an action on a life insurance policy in the sum of $5,000.00 issued by appellant to Carl Oscar Bergholm, and naming his wife, Iris Christine Bergholm, as the beneficiary. That policy contained the usual provisions as to the payment of premiums, as to the policy ceasing and determining if any premium is not paid on the date when due, except as provided in the policy, and as to the policy continuing in force for the term of one month, of not less than thirty days, if any premium after the first one is not paid on the date when due. After the first year the premiums were made payable quarterly, the first quarterly premium being due on February 27, 1927. In addition to the above mentioned provisions the policy contained the following, called "Income Disability Clause:"

"Upon receipt by the Company of satisfactory proof that the Insured is totally and permanently disabled as hereinafter defined the Company will

1. Pay for the Insured all premiums becoming due hereon after the receipt of such proof and during the continuance of the total and permanent disability of the Insured and will also

2. Pay to the Insured a Monthly Income for life of 1% of this Policy; The first payment of such income to be paid immediately upon receipt of such proof and subsequent payments to be made on the first day of each month thereafter as long as the insured shall live and be totally and permanently disabled as hereinafter defined and

3. In addition to the payment of premiums and a Life Income as above set forth the Company, in accordance with the terms of the policy, will pay the full face of this policy, together with all additions thereto, upon receipt of due proof of the death of the Insured, and the premiums and Life Income paid by the Company in conformity with this provision will not be an indebtedness on this policy, and the values in the tables herein will increase and progress from year to year, and this policy will be credited with dividends from the surplus, in like manner as if the premiums were being duly and regularly paid by the insured.

To entitle the Insured to the above Total and Permanent Disability Benefits this policy at the time of making claim for such benefits must be in full force and all premiums becoming due prior to the time of making claim must have been duly paid by the Insured, and the Total and Permanent Disability of the Insured must be due to bodily injuries or disease occurring while this Policy is in full force, and before the Insured shall have attained the age of sixty years, and must be such as to prevent the Insured then and at all times thereafter from performing any work or conducting any business for compensation or profit; provided that, notwithstanding proof of disability may have been accepted by the Company as satisfactory, the Insured shall at any time, on demand, furnish the Company satisfactory proof of the continuance of such disability, and if such proof is not furnished, or if it shall appear to the Company that the Insured is able to perform any work,

or to conduct any business for compensation or profit, then the Company shall cease to pay or allow the above benefits and the Insured shall immediately resume the payment of premiums hereon."

The appellees asserted claims based on the above set out provision. It appeared that the last premium paid by or for the insured was the quarterly one due May 27, 1927, and that the insured died in April, 1929. The claims that appellant became liable to pay to the insured a monthly income of Fifty dollars, beginning September 1, 1927, and continuing so long as he lived, and to pay the amount of the face of the policy to the beneficiary, were based on allegations to the effect that during the spring and summer of the year 1927, and prior to September 27, 1927, while the policy was in full force and effect, all premiums having been paid when due, the insurer became totally and permanently disabled as a result of a disease occuring while the policy was in full force and effect, which disease was such as to prevent the insured then and at all times thereafter until his death from performing any work or conducting any business for compensation or profit. Pleading duly raised the questions whether the appellant did or did not incur the liability asserted if the insured did not, before the expiration of the thirty days allowed for the payment of the unpaid quarterly premium which was due August 27, 1927, make claim for the benefits stipulated for by the above set out provision and furnish to appellant satisfactory proof that the insured was totally and permanently disabled as defined in that provision.

Evidence adduced in the trial showed that at the time the policy was issued the insured was appellant's District Manager at Plainview, Texas, his duties being to solicit and write life insurance for the appellant, to employ agents, to look after the appellant's business and build it up in that part of Texas; that the insured held that position throughout the year 1927, and during the summer and fall of that year and until after the expiration of it, engaged in correspondence in reference to the business of such agency, with Thomas A. Stamp, the State Manager for Texas of the appellant, who was located at Dallas, Texas; that in the course of that correspondence, and also in letters written during that time by the insured's wife to Mr. Stamp,

mention was made of the fact that the insured was or had been sick and unable to work; but there was no statement or suggestion in that correspondence that the insured was totally and permanently disabled as defined in the above set out provision. In the trial there was testimony tending to prove that the insured was totally and permanently disabled prior to September 27, 1927, and that such disability continued until his death. There was no evidence tending to prove the making of any claim for the benefits stipulated for in the above set out provision prior to the date of the following letter written by the insured's wife, the beneficiary:

"Plainview, Texas, April 5, 1928.

Mr. Thomas A. Stamp, Dallas, Texas:

DEAR MR. STAMP: I am just wondering if Oscar can not collect on the disability part of his policy. I tried to get him to make a claim last summer but he would not because he believed it would permanently bar him from taking out any more life insurance, if he collected on a disability clause.

He was disabled for a good deal longer than three months and from what the doctors say it could easily be called disability from the time of his trouble last year.

I talked to Oscar about it and he is of the opinion that he is entitled to it.

I do know he has not been able to work for a long time. He was in bed for about two months last year and for two or three months he was up and down. He would walk down town and back and be almost exhausted. The doctor told him all along not to work, but he felt that he had to and would attempt it, but without success as you know.

It has been discouraging to me at times but I have tried to be patient for I knew he was not well.

Please let me know if he is entitled to any benefits, for we surely are in need of money.

This long spell of sickness is what kept us from being able to pay the last premium, however it began several months previous to the time the premium was due.

Thanking you for any advice you may offer, I am,

Yours truly, Mrs. C. C. Bergholm."

Upon the conclusion of the evidence the court, at the request of the plaintiff, instructed the jury to return a verdict in favor of the plaintiff.

The above set out provision had the effect of creating an exception to the requirements of the policy as to paying premiums within the time allowed in order to keep the policy in force. That provision described the event or contingency upon the happening of which the policy could be kept in force without continuing the payment of the stipulated premiums within the time allowed, and stated what was required to be done to entitle the insured to the total and permanent disability benefits stipulated for. Explicit language of that provision negatives the conclusion that the appellant consented that the fact of the insured becoming totally and permanently disabled as defined in that provision should have the effect of keeping the policy in force without the continued payment of the stipulated premiums within the time allowed by other provisions of the policy, and of entitling the insured to the stated total and permanent disability benefits, without the insured, while the policy is in full force, and before the expiration of the time allowed for the payment of any unpaid premium, making claim for such benefits and furnishing to the appellant proof that the insured is totally and permanently disabled as defined in that provision. The language of that provision makes the making of such claim by the insured and the receipt of such proof by the appellant, while the policy is in full force and before there is a failure to pay any premiums within the time allowed by other provisions of the policy, conditions precedent to the insured becoming entitled to the stated total and permanent disability benefits. The obligation of the appellant to accord to the insured the stated total and permanent disability benefits being purely contractual, the insured could not become entitled to those benefits without doing what the contract required to be done to entitle him thereto. The provision now in question plainly evidences the absence of appellant's consent that the policy remain in force without the continued payment of premiums within the time allowed by other provisions of the policy, and without appellant, before there is a failure to pay a premium within the time allowed, being apprised of a claim by the insured that he is entitled to the stated total and permanent disability benefits, and receiv-

ing proof that the insured is so disabled. Without a compliance with the prescribed requirements the appellant would be deprived of a stipulated for opportunity of being informed whether an authorized excuse for a failure to pay premiums within the time allowed did or did not exist before that time expired, and of determining, within a reasonable time, after the receipt by it in accordance with that provision of proof that the insured is totally and permanently disabled, whether that proof is or is not satisfactory. It reasonably might be expected that an insurer of lives would not consent to a policy remaining in force without the continued payment of premiums, because of the insured becoming totally and permanently disabled after the policy takes effect, without stipulating for being informed, before there is a failure to pay any premium within the time allowed, of a claim that the insured is so disabled, and for being furnished proof satisfactory to itself of the existence of such disability. Where a life insurance policy provides for an exception to the requirement that premiums be paid within prescribed times in order to keep the policy in force, the rights of the insured and the beneficiary under the policy are forfeited by a failure to pay any premium within the time allowed by provisions on that subject, except in so far as the policy provides for the insurer continuing to be liable notwithstanding a discontinuance of the payment of premiums. New England Mut. Life Ins. Co. v. Reynolds, 116 So. 151; Pilot Life Ins. Co. v. Owen, 31 Fed. (2), 862. Instead of undisputed evidence showing that the discontinuance of the payment of premiums was in such circumstance as to bring the failur o pay premiums within the exception stipulated for in the above set out provision of the policy, there was, as appears from the above statement, evidence persuasively indicating that, before the expiration of the time allowed for the insured claiming that he was entitled to the stated total and permanent disability benefits and furnishing to appellant proof of the existence of such disability, the insured elected not to claim that he was entitled to such benefits and not to furnish to appellant proof of the existence of such disability,—in other words elected not to do what the policy required him to do to become entitled to such benefits. As undisputed evidence showed that premiums were not paid within the time allowed, and there was evi-

dence tending to prove that the insured did not do what the policy required to make the insurer subject to the liability asserted by this suit, the court erred in giving to the jury the above mentioned instruction.

Where a life insurance policy provides for a forfeiture of the insurance in case of a failure to pay premium, and one claiming under the policy does not show that his claim is within any exception to the requirement that premiums be paid within the time allowed, disability of the insured at the time of the default in the payment of premium does not avoid the forfeiture. Klein v. N. Y. Life Ins. Co., 104 U. S. 88; Thompson v. Knickerbocker Life Ins. Co., Ib. 252; New York Life Ins. Co. v. Alexander, 15 A. L. R. 314, and note.

Because of the above mentioned error, the judgment is reversed, and the cause is remanded for a new trial.

Reversed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 6042

PEORIA LIFE INSURANCE COMPANY OF PEORIA, ILLINOIS,

versus

Mrs. IRIS CHRISTINE BERGHOLM et al.

JUDGMENT—June 5, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial;

It is further ordered and adjudged that the appellees, Mrs. Iris Christine Bergholm, and another, be condemned in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING—June 25, 1931

It is ordered by the Court that the appellees be granted an extension of ten (10) days within which to file a petition for rehearing in the above entitled and numbered cause.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed June 26, 1931

To the United States Circuit Court of Appeals:

Appellee, Mrs. Iris Christine Bergholm, moves and prays the honorable United States Circuit Court of Appeals to grant her a rehearing, and affirm the judgment of the trial court, upon the following ground:

First Ground

The undisputed evidence showing that the grace period had not expired before September 27, 1927, that on said date the insured was wholly and permanently disabled within the meaning of the policy, that on September 29, 1927, October 17, 1927, and November 10, 1927 (before a reasonable time had expired for furnishing proof of such disability and making claim for benefits), the insurer denied liability and notified insured the policy was forfeited, and the undisputed evidence further showing that on September 26, 1927 (just one day before alleged grace period expired), the insured's wife wrote the insurer that if the insured "does not make a decided change I do not know what is to become of us," that "the doctor tells him still not to work," that "things get worse all along," and that "many times we have had nothing but bread and milk for a meal" (Record 150-151), the honorable Circuit Court of Appeals erred in reversing the judgment of the trial

court and in holding that the clause requiring the furnishing of the proof and the making of claim for benefits while policy was still in full force and before default in payment of the premium, was a "condition precedent to the insured becoming entitled to the stated total and permanent disability benefits," instead of the honorable Circuit Court of Appeals holding, as it should have held, that the insured was entitled to a reasonable time for furnishing proof and making claim.

Wherefore appellee prays that she be granted a rehearing, and that upon such rehearing the judgment of reveral by this court be set aside and that the judgment of the trial court be affirmed.

Respectfully submitted.

E. L. Klett, Lubbock, Texas, Attorney for Appellee, Mrs. Iris Christine Bergholm.

Verification

I, E. L. Klett, counsel for the appellee, hereby certify that this motion for rehearing is presented in good faith and not for delay.

E. L. Klett, E. L. Klett, Counsel for Appellee.

Argument in Support of Motion for Rehearing

We respectfully submit for appellee the construction applied to the disability benefit clause in question is harsh, often impossible of performance, and in conflict with the more modern rule of construction to the effect insured is allowed a reasonable time in which to furnish proof and make claim.

We recognize, as pointed out by the 8th Circuit Court of Appeals in Minnesota Mut. Life Ins. Co. vs. Marshall, 29 Fed. (2) 977, that there "are *two lines of decisions*: one holding that proof of disability fixes the time when the waiver begins; and *the other holding* that the time of waiver is the time of disability, and that *a reasonable time thereafter is allowed* to make proof of such disability," etc.

The 8th circuit followed the second rule, stated above, and certiorari was denied by the U. S. Supreme Court on April 15, 1929, 279 U. S. 851.

To us it seems the U. S. Supreme Court has unmistakably adopted the rule of construction that even though a clause

creates a condition precedent it will not be arbitrarily enforced as such, where such construction works harshly and unreasonably.

On that point, the U. S. Supreme Court held:

"It is said that compliance with this provision, even though impossible, was a condition precedent to the securing of insurance. But narrow and unreasonable interpretations of clauses in an insurance policy are not favored." Stipcich vs. Metropolitan Life Ins. Co., 277 U. S. 311, 72 Law. Ed. 895.

Respectfully submitted.
E. L. Klett, Lubbock, Texas, Attorney for Appellee, Mrs. Iris Christine Bergholm.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—July 16, 1931

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

IN U. S. CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed July 27, 1931

The honorable U. S. Circuit Court of Appeals, 5th Circuit:

Now comes the defendant in error, Mrs. Iris Christine Bergholm, and moves and prays the Court to stay issuance of mandate, on the ground that the defendant in error desires to file petition for a writ of error with the Supreme Court of the United States to review the judgment of the Honorable Circuit Court of Appeals for the Fifth District, heretofore rendered, reversing the judgment of the trial court and remanding same for a new trial.

Defendant in error asks that mandate be stayed for ninety (90) days in order to give her time and opportunity for preparing and filing such petition, that is, that issuance of mandate be stayed until October 14, 1931.

Dated July 23, 1931.

(Signed) E. L. Klett, Lubbock, Texas, Attorney for Defendant in Error.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE—Filed July 27, 1931

On consideration of the application of the appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order unless the abovementioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 27th day of July, 1931.

(Signed) Rufus E. Foster, United States Circuit Judge.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,111. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 297. Mrs. Iris Christine Bergholm et al., petitioners, vs. Peoria Life Insurance Company of Peoria, Illinois. Petition for writ of certiorari and exhibit thereto. Filed August 14, 1931. File No. 36,111.

FILE COPY

Office Supreme C
FILED
AUG 14
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 297

MRS. IRIS CHRISTINE BERGHOLM ET AL.,
PETITIONERS,

vs.

PEORIA LIFE INSURANCE COMPANY OF PEORIA, ILL., RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TOM CONNALLY,
Marlin, Texas;
GEO. R. BEAN,
E. L. KLETT,
Lubbock, Texas,
Attorneys for Petitioners.

(36,111)

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Textbooks and Encyclopedias Cited.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 297

Mrs. IRIS CHRISTINE BERGHOLM ET AL.,
PETITIONERS,

vs.

PEORIA LIFE INSURANCE COMPANY OF PEORIA, ILL., RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Mrs. Iris Christine Bergholm and Miss Adel Bergholm respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The petitioners sued and obtained judgment against the respondent, the Peoria Life Insurance Company

of Peoria, Ill., for the sum of $3,550.00 (R. 63) upon a policy of life insurance for $5,000.00 issued by respondent upon the life of Carl Oscar Bergholm in favor of his wife as beneficiary (R. 26-30). The respondent secured a reversal in the Honorable Circuit Court of Appeals for the 5th Circuit, at New Orleans, upon the sole ground or claim that the "*income-disability clause*" of the policy (R. 33), obligating the insurer to waive payment of premiums and pay monthly disability benefits "upon receipt by the company of satisfactory proof that the insured is totally and permanently disabled" (R. 33) is a "*condition precedent*" which must be complied with, the Honorable Circuit Court of Appeals in this case holds, "while the policy is in full force and *before* there is a failure to pay any premium" (R. 199) notwithstanding said court found, as shown by its opinion, that "there was testimony tending to prove that the insured was totally and permanently disabled prior to September 27, 1927 (the date of the default in payment of the premium), and that such disability continued until his death" (R. 198), the Honorable Circuit Court of Appeals concluding its opinion, and ordering the cause remanded, upon the one proposition that "disability of the insured at the time of the default in the payment of premium does not avoid the forfeiture" (R. 201). The undisputed evidence showed the existence and continuance of such total and permanent disability during period stated, and respondent has never questioned the sufficiency of the proof of total and permanent disability, nor has it raised the question that "satis-

factory proof" of disability was not made within "a reasonable time".

The petitioners take the position that the aforesaid holding that the disability clause creates a condition precedent is untenable and erroneous, because a harsh and unreasonable one, often impossible of performance, and that, therefore, the Honorable Circuit Court of Appeals erred in refusing to hold that insured had a "reasonable time" in which to make "satisfactory proof", especially so, in view of the further holding of said court that the insurer itself is entitled in such event to "*a reasonable time*", after receiving such "satisfactory proof", in which to satisfy itself that the "insured is totally and permanently disabled" (R. 199).

B.

Reasons Relied on for Allowance of the Writ.

(1) The Honorable Circuit Court of Appeals has rendered an erroneous decision in this case in holding the disability clause creates a condition precedent, which holding is untenable and in conflict with the decision of another circuit court of appeals, to wit, the 8th Circuit, on the same matter. In Minnesota Life Ins. Co. *vs.* Marshall, 29 Fed. (2) 977, the 8th Circuit Court of Appeals held, in a policy containing a similar benefit clause, that if the disability occurred prior to default in payment of premium such clause would not be construed as a condition precedent, and that the insured would be entitled to a reasonable time thereafter in which to make proof of disability. In that case, the Honorable 8th Circuit Court, in discuss-